Supreme Court, U.S.
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No. 99 863

IN THE
SUPREME COURT OF THE UNITED STATES

DON PRINCE,

Petitioner.

v.

UNITED STATES OF AMERICA,

Respondent,

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. DID THE COURT OF APPEALS ERR IN AFFIRMING THE DISTRICT COURT'S INSTRUCTION TO THE JURY THAT IN ORDER TO FIND ONE DEFENDANT GUILTY THEY WERE ALSO REQUIRED TO FIND THE OTHER DEFENDANT GUILTY?

II. DID THE COURT OF APPEALS ERR IN FINDING THAT THE DISTRICT COURT'S ADMISSION OF EVIDENCE THAT DON PRINCE AIDED A FUGITIVE WAS HARMLESS ERROR?

III. DID THE COURT OF APPEALS ERR IN FINDING THAT THE IMPROPER ADMISSION OF A RACIAL EPITHET WAS CURED BY INSTRUCTION?

IV. DID THE COURT OF APPEALS ERR IN REFUSING TO FIND THAT THE DISTRICT COURT'S ADMISSION OF AN OUT OF COURT STATEMENT MADE BY BILL PRINCE REQUIRED SEVERANCE BECAUSE BILL'S STATEMENT INCRIMINATED DON PRINCE?

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OPINIONS BELOW

Petitioner was convicted in the United States District Court for the District of South Carolina, at Columbia, CR-97-4329. The Fourth Circuit Court of Appeals affirmed the conviction in an unpublished per curiam opinion decided July 20, 1999. Petitioner filed a timely Petition for Rehearing which was denied on August 17, 1999.

JURISDICTION

Jurisdiction of the Supreme Court is invoked pursuant to Title 28, United States Code, §1254. The decision of the Fourth Circuit took effect on August 17, 1999.

STATUTES INVOLVED

Federal Rule of Evidence 403: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Federal Rule of Evidence 404(B): "Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial."

STATEMENT OF THE CASE

Petitioner, Don Prince, along with his brother, Bill Prince, was indicted for conspiring in a murder-for-hire scheme directed at

killing two persons expected to testify against Bill in connection with an earlier criminal prosecution. Don and Bill Prince proceeded to trial before the Honorable Joseph F. Anderson and a jury on July 9, 1996, through July 16,1996. Both brothers were convicted.

Don Prince was 55 years old at the time of trial. Don went to Cambell College on athletic scholarships in both baseball and basketball. (App. 595). After two years at Cambell College, Don went on to play baseball in the major leagues for the Chicago Cubs. He played professional baseball for seven years. During this time he also earned his degree from East Carolina University. Between baseball seasons, Don taught high school chemistry and physics and coached basketball. Also during this period, Don Prince got married and had two children. (App. 598).

After he left professional baseball, Don went into the insurance business and eventually started his own agency. He sold insurance and did estate planning. Don Prince also obtained his real estate licence and began selling and buying real estate. (App. 602). Don Prince made endowments to Duke University and Campbell College.

During this period, Bill Prince was a farmer. Don and Bill and their families remained close. Don testified that he and Bill have always been close and that he loves his brother. (App. 603). In 1992, Bill Prince was convicted in state court of conspiracy and solicitation of murder. Peaches Andrews was a key witness against Bill Prince on the issue of solicitation.

Bill Prince appealed his state convictions and was released on appeal bond. In the spring of 1993, while Bill Prince was out on appeal bond, he was diagnosed with cancer. Given his condition, Bill Prince was told the he had two years to live. Shortly thereafter, the South Carolina Supreme Court's opinion affirming Bill Prince's conviction was released and Bill filed a petition for rehearing. The petition for rehearing was denied on August 26,1994. Bill was supposed to turn himself in the Monday after rehearing was denied. Instead, Bill Prince left town. He was a fugitive from justice for some eleven months.

A month after Bill Prince fled from the authorities, Don received a call telling him that Bill was in Puerto Rico and that he

was in very bad shape. As soon as Bill was able to travel, Don brought him back to the United States. Don testified that he tried to talk Bill into turning himself in and that Bill told him that he would do so. However, when the brothers landed in Miami, Bill told Don that he was not going to turn himself in. Instead, Bill went to South Florida. Don went back to his home in North Carolina. Thereafter, Don and Bill Prince maintained contact by phone. Don went to Florida to see his brother on one occasion for a couple of days. Don admitted that he helped his brother financially during this period. When Bill began to have heart problems, he came to North Carolina for treatment. As Bill's condition improved, Don continued to try to talk him into turning himself in. Bill was eventually arrested in August of 1995. Don Prince admitted that it was wrong to assist Bill while he was a fugitive; however, he testified that he did it because he loved his brother. (App. 635).

Even before the petition for rehearing in Bill's criminal case was denied, Don had started working with lawyers Mark Stokes and Keith Kornahrens on motions for a new trial and for post conviction relief. Don testified that the plan was to get a new trial for Bill. He testified that the strategy was to get sworn affidavits to Bill's innocence. Bill's business was paying for the investigation, but Don Prince was doing the legwork. Don testified that he regularly came to South Carolina in search of witnesses and affidavits, to meet with attorneys, and to meet with Bill. (App. 639-640).

Don and the attorneys were trying to secure affidavits from witnesses to use in a motion for a new trial or post-conviction relief for Bill. Don had obtained favorable depositions from a couple named Bingham and Charles McRay and he had obtained statements from some twenty other witnesses. (App. 668-675). In addition, Don was talking to T. Cross, a man from Hartsville, South Carolina, who told him that he could get Peaches Andrews to sign an affidavit recanting his prior testimony against Bill. Don had an affidavit prepared and gave it to T. Cross. Don Prince testified that he was very hopeful that Peaches Andrews would provide testimony which would result in a new trial. Don testified that he

maintained this hope that Andrews would cooperate right up until December 14, 1996, the day Don was arrested. (App. 671).

Petitioner presented the testimony of attorneys who confirmed that he and they were working throughout this period to try to obtain affidavits in support of a motion for a new trial. Paul Fata is a South Carolina attorney. Mr. Fata represented Bill Prince at the original trial at which Charlie Dorn Smith was Prince's co-defendant and Peaches Andrews was the State's key witness. (App. 477). Mr. Fata testified that after Bill was incarcerated, he started working with Don Prince on Bill's behalf. Mr. Fata met with Don Prince at 2:00 on December 14,1995, to discuss a pending motion. (App. 489-490).

Mark Stokes is an attorney from Charleston, South Carolina. Mr. Stokes represented Bill Prince in his State appeal. (App. 504). Mr. Stokes testified that Don Prince contacted him about assisting with further legal remedies. Mr. Stokes testified that he was focusing on filing an application for post conviction relief and a motion for a new trial based on after discovered evidence. Mr. Stokes testified that he and another attorney, Keith Kornahrens were looking into contacting potential witnesses to develop evidence for a new trial. Keith Kornahrens did most of the leg work in looking for witnesses and in developing affidavits from different people. Mr. Stokes testified that he met with Don Prince on several occasions and that Don called him regularly. (App. 507). Mr. Stokes testified that they had information that Peaches Andrews was going to provide an affidavit recanting his trial testimony and that Charlie Dorn Smith had given an affidavit indicating that Bill Prince was not involved in the conspiracy to murder. Mr. Stokes testified that these two witnesses were critical to Bill Prince's hopes for a new trial.

Keith Kornahrens testified that he was the attorney doing most of the leg work developing witness statements. He testified that his contact person was Don Prince. Mr. Kornahrens testified that he met with Don Prince many times. Mr. Kornahrens testified that Don Prince was actively pursuing legal remedies for helping his brother and that they discussed individuals whose testimony was necessary and how to go about securing that testimony. Mr.

Kornahrens testified that he and Don Prince continued to discuss pursuing an affidavit from Peaches Andrews right up until December 14,1995. (App. 536-544; 553-558).

In late summer, Bill had started telling Don that he had a friend that was going to be able to get the statements signed. That supposed "friend" was actually inmate informant, Scott Sherpinskas. (App. 675, 682). Don testified that he was "thrilled" to hear that someone else was going to get the statements signed because he had exhausted just about every avenue. (App. 688). Also at this time, a man named George called Don and told him that Bill wanted Don to call with a status report. (App. 683). Don eventually met George Young at the prison. George Young was an inmate and Bill introduced him as a friend. (App. 689).

Don Prince testified that from time to time Bill asked him to send money to people in the prison and others outside the prison. Don testified that on occasion when he was busy, Bill just talked to the secretary and had her send money. Don testified that Bill had him sending people money "very often." (App. 689-693). Don met Young on more than one occasion when Bill told him to give Young money. Don testified that he called George Young several times, however, Don denied that the subject of killing Smith or Andrews ever came up in these conversations. (App. 699).

On December 13,1995, Don received a call from Bill. Bill told Don that he wanted him to meet a man at a rest area and give the man some money for helping with the deal to get affidavits from Peaches Andrews and Charlie Dorn Smith. (App. 671). On December 14,1995, Don Prince drove to South Carolina. (App. 705). He was going to see Bill and he also had a meeting with attorney Fata at 2:00 that afternoon. At Bill's request, Don put $2,500 in one envelope and $2,500 in another. Don testified that he went to the prison where he and Bill discussed the fact that Peaches Andrews was supposedly missing. (App. 711). Nevertheless, Bill told him to go ahead and deliver the money to pay for Andrews' statement. Bill told Don that they would have to hold up on getting the statement from Charlie Dorn Smith because Don had not brought enough money. (App. 713). Bill told Don that the man at the rest stop was going to give him a package and

that the package contained drugs. Don told Bill that under no circumstances would he pick up drugs for him.

The afternoon of December 14,1996, Don drove to the rest area and met the man. Don testified that he was very uncomfortable dealing with the man who was dressed to look like a motorcycle gang member. (App. 715-716). The man was actually undercover agent Bruce Otterbacher. Don testified that the man was "scary." (App. 716). Don gave the man the money from Bill which Don believed would be used to obtain statements. Don testified that neither he nor the man discussed Peaches Andrews or the fact that he was supposedly missing. The man asked Don about Charlie Dorn Smith. Don testified that he thought that the man was talking about getting an affidavit from Smith. Don told the man that "Bill said, hold up." (App. 719).

The man (Agent Otterbacher) tried to sell Don $275 worth of heroin. Don refused to take the drugs, but the man tried to shove the drugs into Don's pocket. Don resisted and never accepted the drugs. (App. 720).

Don testified that if the man he met had said anything about violence or killing, that he would have turned around and left. Don testified that when the man at the rest stop talked about "deals" he assumed the man was talking about procuring witness statements. (App. 720-723). Don testified that if Bill had told him anything about the money being a payoff for murder, he would never have gone to deliver the money.

ARGUMENT

I. The court of appeals erred in affirming the district court's jury instruction that in order to find one defendant guilty they were also required to find the other defendant guilty.

After it had begun deliberations, the jury submitted a question which read:

> In relation to Counts One and Two
> regarding the alleged conspiracy,
> can we render a guilty verdict for one
> defendant and/or a not guilty verdict
> for the other defendant?

The district court judge answered this question, "No." He instructed the jury that a person cannot conspire with himself and that the essence of an agreement is a situation involving two people. The district court ruled that since there were only two defendants named in the indictment, if one was convicted, the jury was likewise required to convict the co-defendant. This ruling was error.

The United States Supreme Court held in United States v. Powell, 469 U.S. 57, 105 S.Ct. 471, 83 L.Ed.2d 461(1984), that a defendant convicted by a jury on one count cannot attack the conviction because it was inconsistent with the verdict of acquittal on another count.

The Powell Court noted; "Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment." 105 S.Ct. at 475. The Powell Court cited the opinion in Dunn v. United States, 284 U.S. 390, 52 S.Ct. 189, 76 L. Ed. 356 (1932), as establishing "the unreviewable power of a jury to return a verdict of not guilty for impermissible reasons." 105 S.Ct. at 476. The Court recognized that out of deference to juries, "Courts have always resisted inquiring into a jury's thought processes." 105 S.Ct. at 478. The Court noted the possibility that inconsistencies may be the result of jury lenity and that Dunn has been explained by both courts and commentators as a recognition of the jury's historic function, in criminal trials, as a check against arbitrariness or the oppressive exercise of power. 105 S.Ct at 477.

The district court should not have interfered with the jury's ability to return the verdict which they believed did justice. The jury may have had a reasonable doubt as to Petitioner's involvement in the murder for hire plot. They may have decided that based on the facts and their instructions, Petitioner was not guilty. The jury may have theorized that Bill Prince conspired with some person

other than Don Prince, for example, George Young. If so, the jury could have concluded that Bill Prince was guilty while Don Prince was not. The jury may even have been attempting to be lenient

Petitioner cannot say with certainty what the jury's thought processes were and an inquiry into their thought processes is not necessary. The jury made it clear that they sought to acquit one of the Petitioners of conspiracy to commit murder even though they convicted his co-defendant. They asked if they could reach these verdicts and they should have been told that they could. Even if the district court judge believed that such verdicts would have been inconsistent, he should not have insisted on consistency from the jury. As argued by Counsel for Petitioner, any inconsistency could have been cured by motion after the verdict.

The trial judge erred in instructing the jury that in order to convict one of the co-defendants it had to convict the other. This instruction robbed Don Prince of his right to require the Government to prove him guilty beyond a reasonable doubt in order to obtain a conviction against him.

The court of appeals did not address this issue in its original per curiam opinion and again failed to address it on rehearing. This is reversible error.

II. The court of appeals erred in finding that the district court's admission of evidence that Don Prince aided a fugitive was harmless error.

Bill Prince was a fugitive for eleven months. The Government sought to present evidence that Don Prince aided his brother during the months that Bill was a fugitive. The district court admitted the evidence over defense objection.

Petitioner argued that the admission of this evidence violated Federal Rule of Evidence 404(b), in that it simply constituted evidence of bad character with no other legitimate evidentiary purpose, and Rule 403, in that its prejudicial effect outweighed its probative value.

The court of appeals held that the evidence of Don's assistance to Bill while he was a fugitive was inadmissible under

both Rule 403 and 404(b). The Fourth Circuit noted that the only probative value of this evidence was to suggest that "Don had previously been involved in Bill's unlawful activity and that he would therefore likely have conspired with his brother in the charged conspiracy." This is inadmissible propensity evidence. The court of appeals acknowledged that the evidence should have been excluded, noting, "It is difficult to see what probative value this evidence could have had other than to suggest that Don had previously been involved in Bill's unlawful activity, and that Don was therefore likely to have conspired with his brother in the charged conspiracy....Even if this evidence could survive scrutiny under Rule 404(b), it would nonetheless be inadmissible under Rule 403 because its prejudicial effect would outweigh whatever modest probative value it might have."

However, the court then found the error harmless in light of the "voluminous properly admitted evidence" presented against Don Prince. The court of appeals held that the error here did not affect the judgment and was therefore harmless. This finding was error.

First, the evidence of Don's assistance to Bill while Bill was a fugitive made up a large portion of the Government's case against Don. Further, although there was "voluminous" evidence of Bill's involvement, there was actually no direct and very little circumstantial evidence against Don. Under these circumstances, the court of appeals erred in finding that this evidence did not affect the judgement.

As noted by the court of appeals, this evidence served the Government by allowing them to show that Don had a history of going to extremes and of breaking the law in order to help his brother Bill. If this evidence had never been presented and Don had been presented to the jury with a clean slate, the Government would surely have had greater difficulty convincing the jury that Don Prince would break the law in order to help his brother. Clearly, the Government's road to convincing the jury that Don participated in the murder for hire conspiracy was paved by the evidence of his prior criminal assistance to his brother. The case against Don was undeniably a close one and the improper

propensity evidence undoubtedly had some effect on the judgement. The court of appeals erred in finding that it was highly probable that the admission of this evidence had no effect on the judgement.

III. The court of appeals erred in finding that the improper admission of a racial epithet was cured by instruction.

The Government sought to introduce a tape recording and transcript of a conversation between Bill Prince and Sherpinkskas. During the conversation, Bill Prince used the term "niggers." Defense counsel moved to exclude the portion of the tape on which Bill Prince used the racial epithet. The district court denied that motion and allowed the racial epithet to be presented to the jury.

The court of appeals rejected every excuse made by the Government for the admission of this evidence. The court of appeals opinion indicates that it was indeed error for the district court to refuse to redact Bill Prince's statement to omit the racial epithet. However, the court then finds that this error was harmless due to the fact that the judge instructed the jury not to allow the offensive language to influence its conclusions. The court of appeals found that the instruction was "sufficient to eliminate the relatively modest prejudicial effect that this isolated epithet might otherwise have had on the jury."

This holding was error. The language at issue here is arguably the single most offensive word in the English language. The prejudicial effect which stems from the use of this word is never "modest." Instead, the use of this word brands the speaker as a racist. The Government understood the devastating strength of this word. The Government argued that while the Prince brothers had been portrayed by the defense as upstanding citizens, the jury was entitled to know what kind of people they really were. The Government argued that the jury should hear Bill Prince's use of this racial epithet so that they would understand his true nature. The Government believed that allowing the jury to hear this one word would turn the jury against the Prince brothers. The Government was right. The use of this word is so powerfully offensive that it convinces the hearer, not just that the speaker uses

bad words, but instead that the speaker is a bad person.

The judge mildly instructed the jury not to be prejudiced because the speaker used language which "might" be offensive to them. The judge's instruction could have been sufficient if the language in question had consisted merely of swear words. However, the instruction was not sufficient to "eliminate" the prejudicial effect which naturally results from the use of this word.

The court of appeals erred in finding that the district court's instruction cured the error.

IV. The court of appeals erred in refusing to find that the district court's admission of an out of court statement made by Bill Prince required severance because Bill's statement incriminated Don Prince.

While in prison, Bill sent a letter to his wife, which contains the following passage:

> Please keep me posted on Pam [Don's daughter] and Scott's kids. I sure hope Jillian will be well soon. I know they are really hurt with everything that is going on. But I hope they will understand that everything is my fault. I will never be able to forgive myself for the problems that I have caused everybody. But if it would be any consolation, I would have done the same for Don.
> (Emphasis added).

The district court ruled that this letter was admissible against Bill, but inadmissible against Don. Don Prince argued that if this letter was to be admitted against Bill, his case should be severed from Bill's. The district court admitted the letter but refused to sever. Don argued that the emphasized sentence in the letter facially and powerfully incriminates him. For this reason, he asserted that its admission at the joint trial violates the rule established in Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

In Bruton, the Supreme Court held that admission at a defendant's trial of the confession of a non-testifying co-defendant, which is "powerfully incriminating" of the defendant, violates the defendant's Sixth Amendment right to confront adverse witnesses. Id. at 135. "A cautionary instruction by the trial court cannot cure such a violation and if such evidence is to be admitted against the co-defendant, severance of the defendants' trials is necessary." Id.

The court of appeals acknowledged that the letter named Don, but found,

> Bruton does not mandate severance unless evidence 'powerfully incriminates' a defendant. In Bruton, the co-defendant directly inculpated the petitioner by stating essentially that "we committed the crime." Here, on the other hand, the challenged passage does not powerfully incriminate Don. To be sure, in light of the evidence presented in this case, a juror could conclude that "the same" Bill would have done for Don referred to the crime charged against Don--conspiring to murder the witnesses against his brother.

Thus, the court of appeals acknowledged that the jury would naturally have concluded that the reference "I would have done the same for Don," constituted an admission by Bill of Don's guilt. Nevertheless, the court of appeals then speculated that the jury might also have interpreted "the same," to refer to Don's assistance to Bill while he was in prison. The court of appeals supposes that "the same" Bill would have done could be interpreted to refer to the fact that Don extensively assisted his brother by running his business, visiting him in jail, and attempting to obtain affidavits. However, the context of the statement clearly shows otherwise.

This statement was made after Don had been arrested and charged with murder for hire. When Bill referenced the "hurt" to Don's family and the unforgivable "problems," that "the same" had caused, he was clearly not talking about the inconvenience Don had

been put to. Bill was clearly not stating that he would "never forgive" himself for inconveniencing his brother. Instead, the most direct and obvious interpretation of Bill's "the same" is that he was referring to murder for hire. Bill was stating that he would have participated in a murder for hire scheme in order to help Don if the roles were reversed. This is the obvious interpretation and it is the only interpretation that makes sense. There is no reason to think that this is not the interpretation that impressed the jury. This statement was therefore powerfully incriminating to Don Prince.

In addition, the barely conceivable, less damaging, interpretation posited by the court of appeals was not presented to the jury. Only Bill could explain what he meant or give an alternate interpretation and Bill was not available for cross-examination. That is the point. Don Prince was not able to put an alternate interpretation of the statement before the jury because he was not able to cross-examine its author. The inability to cross-examine is the problem in Bruton situations. The remedy is severance. "The vice of using a post-conspiracy statement that implicates another defendant lies in the denial of Sixth Amendment rights of confrontation and cross-examination when the author does not testify. Then severance is imperative." United States v. Harris, 409 F.2d 77, 81(4th Cir. 1969).

Severance was imperative here. After the fact, it is apparently possible to think of other innocuous interpretations which could conceivably have been given to Bill's statement. However, there is every reason to believe that the jury gave the statement its obvious meaning. Petitioner could not elicit an innocuous explanation from Bill because Bill did not testify. Petitioner further could not attack the accuracy or veracity of the speaker because, again, Bill was the declarant and Bill did not testify. Petitioner was powerfully incriminated by a hearsay statement and was unable to cross-examine the declarant. This is reversible error.

In Bruton, the Supreme Court held that because of the substantial risk that the jury, despite instructions to the contrary, may look to the incriminating extrajudicial statements in determining guilt of those other than the declarant, admission of

such statements in a joint trial violates the right of cross-examination secured by the confrontation clause of the Sixth Amendment. 391 U.S. 123,126, 88 S.Ct. 1620, 20 L.Ed.2d 476.

The statement made by Bill Prince falls squarely within the prohibition of Bruton. The statement directly links Don Prince to the murder for hire scheme and is highly incriminating. Bill Prince did not testify and could not be questioned as to this statement. Admitting the statement against Bill in Don's trial was prejudicial error and requires a reversal of the conviction of Don Prince.

CONCLUSION

The jury in this case at least considered acquitting Don Prince but was erroneously not allowed to return such a verdict. The jury's inclination to acquit Don Prince highlights the weakness of the Government's case against Don and absolutely vitiates any finding that the evidence against Don was voluminous or overwhelming. Under these circumstances, the court of appeals erred in finding that the numerous evidentiary errors committed by the district court were harmless.

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

November 12, 1999

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APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DON PRINCE,
Defendant-Appellant.

No. 97-4329

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROGER DEWITT PRINCE, a/k/a Bill Prince, a/k/a Ike Davis,
Defendant-Appellant.

No. 97-4334

Appeals from the United States District Court
for the District of South Carolina, at Columbia.
Joseph F. Anderson Jr., District Judge.
(CR-96-122)

Argued: June 8, 1999

Decided: July 20, 1999

Before MURNAGHAN, LUTTIG, and MOTZ,
Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Jack Bruce Swerling, Columbia, South Carolina, for Appellants. John Michael Barton, Assistant United States Attorney, Columbia, South Carolina, for Appellee. **ON BRIEF:** Jack W. Lawson, Florence, South Carolina, for Appellant Roger Prince. J. Rene Josey, United States Attorney, Scarlett Wilson, Assistant United States Attorney, Columbia, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

A jury convicted two brothers, Don Prince and Roger Dewitt ("Bill") Prince, of conspiring in a murder-for-hire scheme directed at killing two persons expected to testify against Bill in connection with an earlier contract murder. Both brothers appeal, asserting that numerous errors require reversal of their convictions and sentences. Finding no reversible error, we affirm.

I.

In 1992, a South Carolina state court tried and convicted Bill Prince, along with Charlie Dorn Smith, of conspiracy and solicitation of the murder of Bill's foster father, Billy Graham. Evidence at that trial showed that Prince and Smith hired a man to kill Graham to eliminate their $259,000 debt to him and to collect on a $500,000 life insurance policy on Graham. Frederick "Peaches" Andrews testified as to Prince and Smith's involvement in Graham's murder.

Prince and Smith appealed their convictions; Prince remained free on bond during the appeal period. The South Carolina Supreme Court reversed Smith's conviction, but affirmed Prince's. Shortly thereafter,

Prince learned he had cancer. He petitioned for rehearing, but the court denied that petition on August 26, 1994. Rather than turning himself in the Monday after the petition for rehearing was denied, Bill Prince left town and remained a fugitive until his capture almost a year later.

Don Prince, Bill's brother, helped Bill evade law enforcement during the year that Bill was a fugitive. Don brought Bill, who was very ill, back to the United States from Puerto Rico, visited Bill, kept in telephone contact with Bill, ran Bill's businesses for him, arranged doctor's appointments for Bill, and found places for Bill to live. When Don's ex-girlfriend learned of Don and Bill's scheme to keep Bill out of jail, Don threatened her to keep her quiet. Don worked with Bill's lawyers on new trial motions and post conviction relief; he attempted to obtain sworn affidavits to assist in these efforts. Don testified at trial, admitting that he assisted Bill in these ways while Bill was a fugitive but explaining that he did so because he loved his brother and wanted to help him during his sickness. Don also testified that he frequently urged Bill to turn himself in.

After state authorities arrested Bill in August 1995, Don, who lived and worked in North Carolina, frequently visited Bill in prison in South Carolina. Don continued managing Bill's affairs and continued to attempt to acquire affidavits in an effort to obtain a new trial for Bill. Don testified to talking to T. Cross, who told Don that he could obtain an affidavit from Peaches Andrews recanting his testimony in the Billy Graham trial. Don had an affidavit prepared and gave it to T. Cross, but Andrews never signed the affidavit. Don also testified to his attempts to obtain an affidavit from Charlie Dorn Smith, who had given an affidavit in 1991 that was helpful to Bill; Don believed that Smith would sign another more detailed affidavit. Don visited Smith and had one of the attorneys and others talk to Smith; Smith, however, did not sign the affidavit. In addition, Don obtained statements from some twenty other witnesses. Various attorneys confirmed that they worked with Don to obtain the affidavits to provide grounds to obtain a new trial for Bill.

In late summer while imprisoned, Bill told Don that he had a friend, a former fellow inmate in state prison, Scott Sherpinskas, who could get the Andrews and Smith affidavits signed. Actually, Sherpin-

skas was an FBI informant. After talking with Bill, Sherpinskas contacted Special Agent Rob Waizenhofer telling him that Bill and Don Prince wanted to hire someone to kill Peaches Andrews and Charlie Dorn Smith. According to Sherpinskas, he and Bill Prince began discussing the contract murders of Andrews and Smith in October 1995. Bill wanted to murder Smith because he believed that Smith had orchestrated the lawsuit that Bill's son, Dewitt, had recently filed to obtain control of his father's business. Bill presumably wanted to kill Andrews because of his testimony in Bill's first trial and his subsequent unwillingness to recant. Bill came up with the idea of having Andrews killed, with Dewitt and Smith's murders to follow. After more thought, Bill decided not to kill Dewitt but to have him framed for possessing heroin in hopes of distracting him from pursuing the lawsuit. Bill assured Sherpinskas that his brother Don would travel from North Carolina to pay Sherpinskas's hit man in South Carolina. Bill also told Sherpinskas that his brother Don was going to find someone else to commit the murders if Sherpinskas could not find someone to do it.

As proof of the Princes' murder-for-hire plot, the Government presented another witness, George Thomas Young, who was imprisoned with Bill Prince during the Fall of 1995. (Young did not know of the plot with Sherpinskas and Sherpinskas did not know of the plot with Young.) Young testified that Bill asked him to arrange to murder Andrews and Smith after Young got out of jail on December 1, 1995, in exchange for a pay-off from Don. Bill gave Young maps to Smith's girlfriend's house as well as to Andrews' house and explained that Don would help Young find the houses and would pay Young for the murders. Don acknowledged that Bill introduced him to Young as a "friend," while Young was still imprisoned, but Don disclaimed all knowledge of the two murder plots.

Upon Young's release from prison, Don, after traveling from North to South Carolina, met with Young and showed him the residences of Smith's girlfriend and of Andrews. Don paid Young approximately $2,000 and gave him telephone charge cards to use for calling Don. Don admitted giving the money and telephone cards to Young at his brother's request, explaining that his brother Bill was extremely generous and often told him to distribute or send money to inmate friends. Using the charge cards, Young frequently contacted Don dur-

ing Young's first week of release, and Don telephoned Young on at least one occasion. According to Young, he also met with Don to discuss the murder plots on December 7. Young's wife and a neighbor corroborated the fact that Young met with Don and that Young had a map of Smith's girlfriend's house. The evidence showed that Young accurately described the homes of Peaches Andrews and Smith's girlfriend.

On December 8, 1995, Sherpinskas pretended that he had arranged to have a hit man murder Andrews and showed Bill a staged photograph depicting the dead body of Peaches Andrews. Bill negotiated with Sherpinskas as to the amount owing for Andrews's murder and the down payment for Smith's murder. Bill assured Sherpinskas that Don would make the payments to Sherpinskas's chosen hit man. Bill and Sherpinskas came up with the code word "Turbeville" for Don to use so that the hit man would know and recognize Don.

When Don arrived at the prearranged location, a rest stop area off Interstate 20, he asked the hit man (actually undercover FBI Agent Bruce Otterbacher who taped their conversation), "You don't know how to get to Turbeville, do you?" Don and Otterbacher discussed the payoff and Don told him to get rid of the envelopes that contained the $5,000 payoff. Otterbacher asked Don if he had seen the newspaper story reporting the disappearance of Peaches Andrews and Don told him that he had been called earlier that morning about the article. Otterbacher talked about the "first deal" and the "second one." Don told the agent "he wants you to hold off on the second one." The agent replied, "he doesn't want me to do Smith?" Don answered, "no, he wants you to hold on it . . . he wants everything on hold" because "things are buzzing about this." There was a mix-up regarding the payments and the agent asked Don when he could talk to his brother Bill and clear the matter up. Don demurred, explaining, "I don't like to talk a lot to him on the telephone because when he was on the run all my lines were bugged . . . and they still may be."

After Don paid the agent, law enforcement officers arrested him. The police reported that Don then stated in a disgusted voice, "The things you would do for your brother." In the weeks after Don's arrests, the Government obtained search warrants for Don's office,

home, boat, and car. The Government introduced at trial several incriminating letters and documents obtained from those searches.

The brothers (mostly Don) lodge numerous arguments as to why their convictions must be reversed.

II.

Both brothers initially object to the district court's refusal to redact a tape recording and transcript of a conversation between Bill and a Government informant in order to omit Bill's use of the word "niggers." They rightly note that this pejorative word had no probative value and was likely to be prejudicial to them.

The Government suggests that the district court offered to allow the defense to use its own version of the transcript, which lacked the epithet. But in fact, the court offered only to allow the admission of the defendant's transcript *in addition to* the transcript prepared by the Government, which did contain the epithet. As the district court observed, this approach would almost certainly have had the effect of making the epithet more conspicuous, and thus the brothers' refusal to agree to it cannot be considered a rejection of a solution to the problem.

The Government also suggests that redaction is unnecessary in this case because the epithet was isolated, redaction would have delayed the trial, and the defense had failed to seek redaction before trial even though it had access to the tape for several weeks. The primary reason the defense failed to request redaction earlier, however, appears to be that its transcript of the tape never included the word. Although at trial the Government asserted that redaction would take "all afternoon," that statement seems to have been based primarily on its concern that new transcripts would have to be made, and the district court indicated that new transcripts could be made quickly and easily. Accordingly, we find the Government's argument that the epithet was properly admitted because redaction would have caused unjustifiable delay unpersuasive.

However, we believe that the error in failing to redact the statement was harmless because of the district court's careful jury instruction.

"We generally presume that a jury will follow cautionary instructions regarding potentially prejudicial evidence." *United States v. Love*, 134 F.3d 595, 603 (4th Cir. 1998). The district court instructed the jury not to allow the offensive language in the tape influence its conclusions. This instruction was sufficient to eliminate the relatively modest prejudicial effect that this isolated epithet might otherwise have had on the jury.

III.

While in prison, Bill sent a letter to his wife, which contains the following passage:

> Please keep me posted on Pam [Don's daughter] and Scott's kids. I sure hope Jillian will be well soon. I know they are really hurt with everything that is going on. But I hope they will understand that everything is my fault. I will never be able to forgive myself for the problems that I have caused everybody. *But if it would be any consolation, I would have done the same for Don.*

(Emphasis added). The district court concluded that this letter constituted proper admissible evidence against Bill, but not against Don. Neither of those rulings is challenged on appeal.

What Don does challenge is the district court's refusal to sever his trial from Bill's. Don contends that the emphasized sentence in the letter facially and powerfully incriminates him. For this reason, he asserts that its admission at their joint trial violates the rule established in *Bruton v. United States*, 391 U.S. 123 (1968). In *Bruton*, the Supreme Court held that admission at a defendant's trial of the confession of a non-testifying co-defendant, which is "powerfully incriminating" of the defendant, violates the defendant's Sixth Amendment right to confront adverse witnesses. *Id.* at 135. A cautionary instruction by the trial court cannot cure such a violation and if such evidence is to be admitted against the co-defendant, severance of the defendants' trials is necessary. *Id.*

Subsequently, in *Richardson v. Marsh*, 481 U.S. 200 (1987), however, the Court clarified that a jury instruction can prevent or cure a

Sixth Amendment violation where the proffered statement does not expressly implicate the defendant, but only becomes incriminating by virtue of an inference from other evidence. The Court explained:

> Where the necessity of such linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence. Specific testimony that "the defendant helped me commit the crime" is more vivid than inferential incrimination, and hence more difficult to thrust out of mind. Moreover, with regard to such an explicit statement the only issue is, plain and simply, whether the jury can possibly be expected to forget it in assessing the defendant's guilt; whereas with regard to inferential incrimination the judge's instruction may well be successful in dissuading the jury from entering onto the path of inference in the first place, so that there is no incrimination to forget.

Id. at 208.

The *Richardson* Court emphasized that the statement at issue there omitted all reference to the existence of the defendant; of course, here, the challenged statement does expressly name Don. Moreover, the *Richardson* Court rationalized its distinction between "facially incriminating" statements and statements "requiring linkage" by noting that a rule limiting the application of *Bruton* to the former could be "complied with by redaction — a possibility suggested in that opinion itself." *Id.* at 208-09. Here, redaction of the last sentence would have entirely remedied the problem; however, neither the parties nor the district judge considered redaction. They only discussed exclusion of the entire letter, severing Don's trial from Bill's, or admission of the letter with an instruction that the jury was only to consider it as evidence against Bill. (Don rejected the instruction.)

Thus, the case at hand differs from *Richardson*. However, Don cannot prevail based on these distinctions because *Bruton* does not mandate severance unless evidence "powerfully incriminates" a defendant. In *Bruton*, the co-defendant directly inculpated the petitioner by stating essentially that "we committed the crime." Here, on the other hand, the challenged passage does not powerfully incriminate Don.

To be sure, in light of the evidence presented in this case, a juror could conclude that "the same" Bill would have done for Don referred to the crime charged against Don — conspiring to murder the witnesses against his brother. Even if all evidence of Don's aid to Bill while Bill was a fugitive was excluded, *see infra* at 11-12, the Government presented abundant evidence that while Bill was imprisoned, Don visited and telephoned Bill frequently, ran his businesses, and worked feverishly to obtain the affidavits believed necessary for Bill's new trial. Indeed, Don testified at trial and freely admitted to the considerable efforts he made on his brother's behalf.

If Don was, as he claimed, not guilty of the crime charged, Bill might well have especially regretted and so particularly apologized to the family for the fact that Don's innocent assistance to him could be used as circumstantial evidence tying Don to Bill's criminal conspiracy. The statement in Bill's letter is not in any way inconsistent with Don's defense that he extensively assisted his brother but never participated in any murder-for-hire plot. The statement, standing alone, simply does not powerfully incriminate Don.

IV.

Don also challenges the search warrants used by the Government to search his car, home, boat, and office. He contends that the warrants were supported by false information, were not based on probable cause, and were overbroad.

We have carefully examined the affidavits and warrants. We have no difficulty concluding that the affidavits contained no information known by the officers to be materially false. Similarly, those affidavits provide ample probable cause to justify issuance of the warrants.

Some portions of the warrants do, however, contain broad boilerplate language authorizing seizure of every conceivable item without tying these items to the alleged crimes or circumstances of the case. However, the first two categories of "items to be seized" listed in the warrant are specifically identified, *i.e.* "life insurance policies, business transactions, and/or communications involving" Bill, Don, and their allegedly intended victims, and documents "evidencing the fraudulent or illegal acquisition of life insurance policies or the pro-

ceeds thereof." These two categories are certainly described with adequate particularity. *See United States v. Fawole*, 785 F.2d 1141, 1144 (4th Cir. 1986).

We have held that, in order to avoid the suppression of lawfully seized evidence, a warrant that properly identifies some items "will not be defeated by [other] ambiguous or conclusionary language" so long as the warrant was "sufficiently particularized with respect to the items seized." *United States v. Jacob*, 657 F.2d 49, 52 (4th Cir. 1981). In other words a court will "sever" the too general portion of the warrant from the sufficiently specific portion. *See United States v. George*, 975 F.2d 72, 79 (2d Cir. 1992). A search "conducted pursuant to a warrant held unconstitutional in part does not invalidate the entire search [and] only those items seized beyond the warrant's scope will be suppressed." *Id.* ("'the remedy with respect to any items exceeding the scope of the warrant [is not] invalidation of the search but suppression of those items.'") (quoting *United States v. Dunaloy*, 584 F.2d 6, 11 n.4 (2d Cir. 1978)).

Don has pointed to no evidence used by the Government at trial that did not fall into the properly identified first two categories of the warrant. The evidence obtained pursuant to the lawful portion of the warrant was rightly admitted, the remainder of the warrant, while too broad, provides no basis for reversal.

V.

Don maintains that the district court erred in admitting, over his objection, evidence of Bill's prior murder conviction; evidence that Bill was a beneficiary of the insurance policies held by the victim of that murder, Billy Graham, and by one of the intended victims of the instant murder-for-hire scheme; evidence that Don helped Bill collect on Graham's policy; evidence that Don helped Bill when he was a fugitive; evidence, including the complaint, of a lawsuit brought against Don by his nephew; and evidence of threats allegedly made by Don against a woman who later testified at trial for the Government. Don asserts that the admission of this evidence violated Federal Rule of Evidence 404(b), in that it simply constituted evidence of bad character with no other legitimate evidentiary purpose, and Rule 403, in that its prejudicial effect outweighed its probative value.

Rule 404(b) permits admission of evidence necessary to prove "motive, opportunity, preparation, plan, knowledge, identity or absence of mistake or accident." *United States v. Bailey*, 990 F.2d 119, 122 (4th Cir. 1993). Also admissible is evidence of bad acts that arise out of the same series of transactions as the charged offense and is "necessary to complete the story of the crime," *United States v. Kennedy*, 32 F.3d 876, 885 (4th Cir. 1994), evidence inextricably intertwined with the charged crime, *United States v. Chin*, 83 F.3d 83, 88 (4th Cir. 1996), or evidence "elicited as part of the groundwork that the government needed to lay to explain to the jury how . . . individuals fit into the operation of [a] conspiracy," *United States v. McMillon*, 14 F.3d 948, 955 (4th Cir. 1994). It is well established that evidence of these kinds does not implicate Rule 404(b)'s prohibition of evidence admitted solely to demonstrate bad character. *See Kennedy*, 32 F.3d at 886; *Chin*, 83 F.3d at 88; *McMillon*, 14 F.3d at 955.

We fail to see what bearing Bill's murder conviction and his status as a beneficiary of the insurance policies would have on the matter of Don's character, and thus we doubt that this evidence even raises a question under Rule 404(b). The evidence concerning Bill and the insurance policies certainly has no such significance in itself. Assuming that Bill's prior murder conviction could have subjected Don to inferences of guilt or bad character by association, that evidence was plainly admissible as evidence necessary to complete the story of the crime. *See Kennedy*, 32 F.3d at 885. Similarly, the evidence concerning the lawsuit was properly admitted to illustrate Don's motive and intent to kill Smith. Likewise, Don's threatening statements to his ex-girlfriend was evidence of his intent, preparation, plan, and absence of any mistake. Nor did any of this evidence unfairly prejudice Don.

The evidence that Don helped Bill collect on the Graham policy and that Don helped Bill while he was a fugitive, by contrast, should have been excluded. This evidence could have been omitted without adversely affecting a complete presentation of the story of the crime alleged against Don, *i.e.*, conspiracy to murder the witnesses. The assistance Don gave Bill when he was a fugitive manifestly was not part of the same criminal episode as the conspiracy to murder the witnesses; the "criminal episode" surrounding Bill's flight from justice terminated when Bill was captured, and there is nothing to indicate

that Bill planned to murder the witnesses before then. Thus, evidence of Don's assistance to Bill while he was a fugitive was not admissible as evidence of acts constituting "necessary preliminaries" to the conspiracy, acts "inextricably intertwined" with it, acts forming part of a single criminal episode containing the alleged crime, *Chin*, 83 F.3d at 88, or acts arising out of the same series of transactions, *Kennedy*, 32 F.3d at 885.

It is difficult to see what probative value this evidence could have had other than to suggest that Don had previously been involved in Bill's unlawful activity, and that Don was therefore likely to have conspired with his brother in the charged conspiracy. The only justifications that the Government offers for this evidence are that it "allowed the jury to fully understand the extent of the conspiracy and the illegal methods used by him and Bill in reaching the goal of their conspiracy," and that it "shows how the Prince brothers established a relationship of trust through their activities and how these events flowered into the charged crimes." Brief of Appellant at 33. The former assertion falsely implies that the prior bad acts were part of the conspiracy alleged, and the latter in effect creates a new exception to Rule 404(b) that would allow a defendant's prior bad acts in conjunction with a co-defendant, whatever their nature, to be admitted in virtually every instance.

In sum, even if this evidence could survive scrutiny under Rule 404(b), it would nonetheless be inadmissible under Rule 403 because its prejudicial effect would outweigh whatever modest probative value it might have. However, even where the trial court abuses its discretion in admitting bad character evidence, such error may be harmless. *See United States v. Kenny*, 973 F.2d 339, 344 (4th Cir. 1992). In deciding the harmlessness of an error we must determine "whether we can say that we believe that it is 'highly probable that the error did not affect the judgment.'" *United States v. Madden*, 38 F.3d 747, 753 (4th Cir. 1994) (quoting *United States v. Nyman*, 649 F.2d 208, 212 (4th Cir. 1980)). In light of the voluminous properly admitted evidence detailed above against Don, we have no difficulty finding that the error here did not affect the judgment and was therefore harmless.

VI.

Don asserts that the district court erred by instructing the jury that "[i]t does not matter whether the interstate travel took place before or after the murder occurred or was supposed to have occurred," because the statute criminalizes interstate travel with an intent that murder "be committed," not interstate travel following a murder.

Don maintains that the meeting in which he gave money to the Government agent occurred after the victim to whom the payment allegedly related, Peaches Andrews, was already believed to be dead. Even if the Government cannot rely on evidence of travel post-murder, a question we need not decide here, this does not assist Don in light of the fact that the Government produced evidence tending to show that Don traveled interstate to further the plan to murder Andrews *before* he came to believe Andrews was dead. The evidence indicated, for example, that Don could not have believed Andrews was dead prior to December 8, and that Don drove from North to South Carolina on December 1 to meet with an individual concerning Andrews's murder.

VII.

We have carefully reviewed Don's other arguments as to why his conviction must be reversed and find them all meritless. There remains only Don's assertion that the district court improperly enhanced his sentence for obstruction of justice under U.S.S.G. § 3C1.1.

On appeal, Don essentially contends that there was insufficient evidence for the district court to find that he gave false testimony when he took the stand. The district judge made a finding at the sentencing hearing that Don had lied at trial when he testified that the money he gave to the hit man was paid for the purpose of obtaining affidavits to help secure a new trial for Bill. The district court relied heavily on the audio tape of the meeting at the interstate rest area between Don and Agent Otterbacher. Though the court noted that "the parties [on the tape] used guarded language and code words," it also noted that "[i]t was obvious they were talking about something that was somewhat nefarious" and that there was no reference on the tape to any sort

of affidavit. Indeed, the tape contains interchanges between Don and the undercover agent that seem surely related to the plot to murder Peaches Andrews and Smith, not to affidavits. For instance, when Otterbacher complained about the amount of money Don had brought, the following exchange took place:

> Otterbacher: I was supposed to get five thousand for the first deal, okay. That was up front and I was supposed to get five thousand more cut in half and you guys were gonna hold on to half of it for the second one.
>
> Don: Yeah, but [Bill] wants you to hold off on the second one.
>
> Otterbacher: Oh, he doesn't want me to do Smith?
>
> Don: No, no, no, no, no he [Bill] wants to hold on it.
>
> Otterbacher: I thought he wanted him done in a couple days.
>
> Don: No, no, no, no, he wants you to hold him. He wants you to hold on him . . . .

The discussion on the tape in conjunction with the trial testimony of Sherpinskas, who arranged the meeting, convince us that the district court did not commit clear error when it found that Don had lied on the stand about this meeting. Thus there was sufficient evidence to support the district court's obstruction of justice enhancement.

In his reply brief, Don additionally contends that the sentencing judge failed to follow the requirements of *United States v. Dunnigan*, 507 U.S. 87 (1993). *Dunnigan* directs that in order to impose an enhancement for obstruction of justice, a court must make a "finding . . . of an obstruction of, or impediment to, justice that encompasses all of the factual predicates for a finding of perjury." *Id.* at 95. The "factual predicates" consist of at least the main elements of the Court's definition of perjury: falsity, materiality, and intent. *See id.* at 94. Don contends that in this case the district court found only that Don committed "perjury," and made no specific findings on two of the factual predicates, namely intent to testify falsely and materiality.

Whether the district court's finding was sufficient under *Dunnigan* presents a close question. However, this circuit has long held that we will not address new arguments raised for the first time in the reply brief. *See Hunt v. Nuth*, 57 F.3d 1327, 1338 (4th Cir. 1995). Don has thus waived his *Dunnigan* argument; the obstruction of justice enhancement was not otherwise in error.

AFFIRMED

(2)

No. 99-862

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

DON PRINCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred in instructing the jury that it could not find one defendant guilty of conspiracy and the other defendant not guilty, because the government had to prove "that the two defendants entered into the unlawful agreement charged."

2. Whether the district court committed reversible error in admitting evidence that petitioner aided his co-defendant when he was a fugitive.

3. Whether the district court committed reversible error in admitting evidence that petitioner's co-defendant used a racial epithet.

4. Whether the district court committed reversible error in letting the jury consider an admission by petitioner's co-defendant that mentioned petitioner.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-15) is unpublished, but the decision is noted at 187 F.3d 632 (Table).

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1999. A petition for rehearing was denied on August 17, 1999. On November 8, 1999, the Chief Justice extended the time for filing a petition for certiorari until December 15, 1999, and the petition for a writ of certiorari was filed on November 18, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioner was convicted in the United States District Court for the District of South Carolina on two counts of conspiring in a murder-for-hire scheme, in violation of 18 U.S.C. 1958(a), and one count of travel in interstate commerce with intent to commit murder-for-hire, in violation of 18 U.S.C. 1958(a). Petitioner was sentenced to 211 months' imprisonment, to be followed by three years' supervised release, and was fined $5000. The court of appeals affirmed. Gov't C.A. Br. 3; Pet. App. 1-15.

1. Petitioner's co-defendant brother, Bill Prince, and Charlie Dorn Smith were convicted in 1992 for the contract murder of Bill Prince's foster father, Billy Graham. Frederick "Peaches" Andrews testified for the State about Bill Prince's and Smith's involvement in the murder. The South Carolina Supreme Court reversed Smith's conviction, but affirmed Bill Prince's. After Bill Prince's petition for rehearing was denied on August 26, 1994, he became a fugitive until his capture a year later. Petitioner helped Prince remain a fugitive by running his businesses, arranging doctor's appointments, and finding places for him to stay. When petitioner's ex-girlfriend learned of the scheme to evade the authorities, petitioner threatened her to keep her quiet. Petitioner also worked with his brother's lawyers to procure affidavits in support of a motion for new trial or post conviction relief. Gov't C.A. Br. 4; Pet. App. 2-3. After Bill Prince was arrested in August 1995, petitioner frequently visited him in prison and continued to seek affidavits in the hopes of obtaining a new trial for him. In particular, petitioner prepared affidavits for Peaches Andrews and Charlie Dorn Smith, but they did not sign them. Gov't C.A. Br. 4-5; Pet. App. 3.

In October 1995, Bill Prince, while in prison, began talking to another inmate, FBI informant Scott Sherpinskas, about arranging for the contract murders of Andrews and Smith. Bill Prince told Sherpinskas that petitioner would travel from North Carolina to pay Sherpinskas's hit man in South Carolina, and further said that petitioner would find someone else to commit the murders if Sherpinskas could not find a hit man. Gov't C.A. Br. 5; Pet. App. 3-4.

Bill Prince asked another inmate, George Thomas Young, to commit the murders after Young's release from prison on December 1, 1995. Bill Prince gave Young maps to the houses of Smith's girlfriend and Andrews, and told Young that petitioner would assist Young in locating the houses and would pay him for the murders. Gov't C.A. Br. 5-6; Pet. App. 4.

After traveling from North to South Carolina, petitioner met with Young on December 1, 1995, and showed him the residences of Smith's girlfriend and of Andrews. Petitioner paid Young approximately $2000 and gave him telephone charge cards to use for calling petitioner. During the next week, Young called petitioner several times, and petitioner called Young on at least one occasion. Petitioner and Young met again on December 7, 1995, to discuss the murder plots. Gov't C.A. Br. 6; Pet. App. 4-5.

On December 8, 1995, Sherpinskas pretended that his hit man had murdered Andrews, showing Bill Prince a picture allegedly depicting Andrews' dead body. Bill Prince agreed to pay for Andrews' murder and to make a down payment for Smith's murder, assuring Sherpinskas that petitioner would meet the hit man and make the payments. The men agreed that petitioner would use the code word "Turbeville" so the hit man would recognize him. Gov't C.A. Br. 6-7; Pet. App. 5.

On December 14, 1995, petitioner visited his brother in prison. After the meeting, petitioner traveled to a remote rest area located off Interstate 20. When petitioner approached the hit man, who was an undercover agent, at the prearranged location, he asked, "You don't know how to get to Turbeville, do you?" The men discussed the pay-off, and petitioner told the agent to get rid of the envelopes that contained the $5000. The agent asked petitioner whether he had seen the newspaper story reporting the disappearance of Andrews, and petitioner responded that he had been called about the article that morning. The agent asked whether he should "do Smith," and petitioner told him to "hold on it" because "things are buzzing about [Andrews]." The men discussed a mix-up regarding the payments on the Smith deal, and the agent asked whether petitioner would talk to his brother to clear it up. Petitioner responded that he did not like to talk about these issues on the telephone because "my lines were bugged [when Bill was on the run] * * * and they still may be." Gov't C.A. Br. 7; Pet. App. 5.

After paying the agent, petitioner was arrested. He remarked in a disgusted voice, "The things you would do for your brother." The government later recovered several incriminating letters and documents in petitioner's home, office, boat, and car. Gov't C.A. Br. 7-8; Pet. App. 5-6.

2. Before trial, petitioner moved to exclude certain pieces of evidence, including evidence that he assisted his brother while he was a fugitive. The district court admitted the evidence under Federal Rule of Evidence 404(b). C.A. App. 150-151. During trial, petitioner also objected to the introduction of a recorded conversation between Bill Prince and Sherpinkas in which Bill Prince used the word "niggers." *Id.* at 989-991. The district

court overruled the objection, *id.* at 996-997, but gave the jury the following cautionary instruction:

> [S]ome of the language that you hear on this tape may be offensive to you. You must not be biased or prejudiced in this case because of the language someone might use when they do not know they are being taped. And I know you can't put a line down your mind, but you really need to be conscientious about not being influenced by the form of the words used.

Id. at 1041.

Petitioner also objected to the introduction of a letter from Bill Prince to his (Bill's) wife while he was in prison. Bill Prince stated in the letter that "everything is my fault. I will never be able to forgive myself for the problems that I have caused everybody. But if it would be any consolation, I would have done the same for Don." C.A. App. 1148. The district court ruled that the letter was admissible only against Bill Prince, but the court denied petitioner's motion to sever, ruling that a limiting instruction would be sufficient. *Id.* at 1140-1143.

During deliberations, the jury submitted the following question to the court: "In relation to Counts One and Two regarding the alleged conspiracy, can we render a guilty verdict for one defendant and/or a not guilty verdict for the other defendant?" C.A. App. 1741. In response, the district court instructed the jury as follows:

> I would say the answer to that question is no. The reason for that answer is as follows: You will recall I told you in my jury instructions, a conspiracy is a kind of criminal partnership[,] a combination or a[n] agreement of two or more persons to join together

> to accomplish some unlawful purpose. I also told you that of the four elements necessary for the government to prove beyond a reasonable doubt to establish a conspiracy, the first of those elements is that the two defendants entered into the unlawful agreement charged in the indictment between on or about October First, 1995, and December 14th, 1995. Thus, because the essence of an agreement is a situation involv[ing] two people, the answer to the question you have asked me is no.

Id. at 1742.

3. The court of appeals affirmed. Pet. App. 1-15. The court of appeals agreed with petitioner that the district court should have redacted Bill Prince's use of the word "niggers" in the recorded conversation between Bill Prince and Sherpinskas. *Id.* at 6. The court of appeals held that the error was harmless, however, because the district court gave a "careful jury instruction" that "was sufficient to eliminate the relatively modest prejudicial effect that this isolated epithet might otherwise have had on the jury." *Id.* at 6-7.

The court of appeals further held that the district court's refusal to grant a severance in connection with Bill Prince's letter to his wife did not violate the rule in *Bruton* v. *United States*, 391 U.S. 123 (1968), that bars the admission of a confession of a non-testifying co-defendant that is "powerfully incriminating" of the defendant. Pet. App. 7-9. The court of appeals observed that petitioner did not request the district court to redact the one sentence of the letter that referred to petitioner—"But if it would be any consolation, I would have done the same for Don." *Id.* at 7. The court of appeals also explained that the vague language of the letter was open to different interpretations, including

one that was consistent "with [petitioner]'s defense that he extensively assisted his brother but never participated in any murder-for-hire plot." *Id.* at 9. As such, the court of appeals held that the letter "simply does not powerfully incriminate [petitioner]." *Ibid.*

The court of appeals further ruled that the district court erred in admitting Rule 404(b) evidence that petitioner assisted his brother when he was a fugitive, reasoning that such evidence "was not part of the same criminal episode as the conspiracy to murder the witnesses." Pet. App. 11. The court of appeals stated, however, that it had "no difficulty finding" the error harmless, "[i]n light of the voluminous properly admitted evidence * * * against [petitioner]." *Id.* at 12.

The court of appeals did not specifically address petitioner's challenge to the district court's jury instruction in which the court told the jury that it could not find one defendant guilty of conspiracy but not the other. But the court of appeals stated that it had "carefully reviewed [petitioner's] other arguments," and found them "all meritless." Pet. App. 13.

ARGUMENT

1. Petitioner argues (Pet. 6-8) that the district court erred in instructing the jury that it could not find one defendant guilty of conspiracy and the other defendant not guilty. That is incorrect. The indictment in this case charged that petitioner and his brother conspired to commit murder-for-hire. C.A. App. 16-17.[1] Similarly, the government's theory at trial was that petitioner and his brother—and no one else—conspired to commit the murder-for-hire scheme. The jury likewise was

[1] The indictment therefore did not allege, as some indictments do, that the defendants conspired "with others known and unknown to the grand jury."

instructed that the government had to prove an unlawful agreement between petitioner and his brother, "the two defendants." See Transcript of Jury instructions, at 191-196. Under those circumstances, the trial court properly instructed the jury that it could not convict one defendant of conspiracy and acquit the other. See *United States* v. *Williams*, 341 U.S. 70, 86 (1951) (Black, J., concurring) ("[O]ne person obviously cannot conspire with himself."); *United States* v. *Davis*, 183 F.3d 231, 244 (3d Cir. 1999) ("[A] person cannot conspire with himself[.]"); *United States* v. *Campbell*, 64 F.3d 967, 978 (5th Cir. 1995) ("[A] single defendant cannot conspire with himself.").

Petitioner further errs in relying (Pet. 7-8) on *United States* v. *Powell*, 469 U.S. 57, 64-69 (1984), which rejected the notion that a rationally irreconcilable verdict entitles a criminal defendant to reversal of his conviction. Nothing in that decision suggests that a criminal defendant is entitled to an instruction expressly authorizing the jury to render inconsistent verdicts. Although the Court in *Powell* recognized the unreviewable power juries have to nullify the law and evidence, the Court also described that power as one "which [the jury has] no right to exercise." *Id.* at 66 (quoting *Dunn* v. *United States*, 284 U.S. 390, 393 (1932)); see also *United States* v. *Thomas*, 116 F.3d 606, 616 n.9 (2d Cir. 1997) ("[C]riminal defendants have no right to a jury instruction alerting jurors to this power to act in contravention of their duty.").[2] Accordingly,

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[2] The Court in *Powell* also explained that criminal defendants are protected from any prejudicial "jury irrationality" by "sufficiency-of-the-evidence review." 469 U.S. at 67. Here, petitioner does not challenge the sufficiency of the evidence to support his conviction on two counts of conspiracy. Moreover, petitioner's suggestion (Pet. 8) that the jury may have convicted

Powell provides no support for petitioner's contention that he was entitled to have the jury instructed that it could reach inconsistent verdicts.

2. Petitioner argues (Pet. 8-10) that the district court's admission of evidence that petitioner helped his brother remain a fugitive was reversible error. Even assuming that the evidence was inadmissible,[3] the court of appeals properly held that any such error was harmless "[i]n light of the voluminous properly admitted evidence" against petitioner. Pet. App. 12. That fact-bound conclusion does not merit further review. See *United States* v. *Hasting*, 461 U.S. 499, 510 (1983) (noting that this Court undertakes harmless error review "sparingly").

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him of consiracy solely to support the conspiracy conviction of his brother is belied by the jury's conviction of petitioner on the subsantive count of murder-for-hire.

[3] The evidence of petitioner's assistance to his brother while he was a fugitive was, in fact, highly probative in illustrating the nature of the relationship the conspirators enjoyed before hatching the murder-for-hire plot. The evidence not only showed the relationship of trust between petitioner and his brother and how petitioner's sense of loyalty motivated his actions, but it also illustrated the substantial level of involvement petitioner had in fighting his brother's murder conviction. When the brothers failed to obtain Bill Prince's release from prison, they decided to take revenge on the men who they believed were responsible for Bill Prince's predicament. The evidence therefore was "inextricably intertwined" with the conspiracies charged and was necessary to tell the complete story. See *United States* v. *Chin*, 83 F.3d 83, 87-88 (4th Cir. 1996). And the probative value of this evidence was not substantially outweighed by its prejudicial effect. Petitioner's assistance to his brother when he was a fugitive helped put into context his subsequent participation in the murder plots, and a reasonable jury would not conclude from that evidence alone that petitioner would participate in a murder-for-hire scheme.

3. Petitioner also challenges (Pet. 10-11) the court of appeals' harmless error finding with respect to the district court's failure to redact the word "niggers" from the recorded statement of Bill Prince. The court of appeals concluded, however, that jurors are presumed to follow the trial court's instructions, Pet. App. 7, and the court's "careful jury instruction," *id.* at 6, directing the jury not to be swayed by an emotional reaction to the word "was sufficient to eliminate [its] relatively modest prejudicial effect." *Id.* at 7. That conclusion was correct and too fact-bound to warrant this Court's review.

4. Finally, petitioner contends (Pet. 11-14) that the admission of a letter from Bill Prince to his (Bill's) wife violated his Confrontation Clause rights because it incriminated him, and the district court refused to grant him a severance. That claim also lacks merit.

The court of appeals correctly upheld the district court's refusal to sever petitioner's case, because the letter did not "powerfully incriminate[]" petitioner and this did not trigger the rule in *Bruton* v. *United States*, 391 U.S. 123 (1968). Pet. App. 8. In *Bruton*, the Court held that the admission at a joint trial of a non-testifying co-defendant's confession that powerfully incriminated the defendant violated the Confrontation Clause. The Court explained that, even if the jury receives limiting instructions to disregard the co-defendant's confessions when considering the defendant's case, they are not adequate to protect against misuse of the co-defendant's confession. See *Gray* v. *Maryland*, 523 U.S. 185, 190 (1998).

That analysis does not apply here. The statements in the letter did not refer specifically to any crimes; instead, Bill Prince commented that "everything" was his fault; that he would not be able to forgive himself for

the "problems" he caused; and that he would have "done the same" for petitioner. Similarly, while the letter mentioned petitioner by name, it did not identify anything petitioner had done. As such, the statement did not directly incriminate petitioner; rather it would incriminate him only if the jury drew inferences from other evidence adduced at trial. Pet. App. 9; see also *United States* v. *Lage*, 183 F.3d 374, 387-388 (5th Cir. 1999) (statement mentioning defendant by name, but which was "harmful to defense only if jury made several inferential jumps," did not powerfully incriminate defendant such that there was risk jurors would disobey limiting instructions.), cert. denied, 120 S. Ct. 1180 (2000); cf. *Richardson* v. *Marsh*, 481 U.S. 200, 208 (1987) ("the judge's instruction may well be successful in dissuading the jury from entering onto the path of inference in the first place."). Petitioner moreover rejected a limiting instruction, Pet. App. 8, see Fed. R. Evid. 105, and never asked the district court to redact the one sentence in the letter that mentioned him, Pet. App. 8; cf. *Richardson*, 481 U.S. at 209.

Moreover, as the court of appeals explained, even if the jury sought to infer the letter's meaning by reference to the evidence presented, it is not clear that the jury would have assigned the incriminating meaning petitioner suggests. Indeed, "[t]he statement in Bill's letter is not in any way inconsistent with [petitioner's] defense that he extensively assisted his brother but never participated in any murder-for-hire plot." Pet. App. 9. As such, it was not "powerfully incriminat[ing]." *Ibid.* And, in any event, its admission at trial would be, at most, harmless error. See *Harrington* v. *California*, 395 U.S. 250, 254 (1969).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2000

EDITOR'S NOTE

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Supreme Court, U.S.
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No. 99-863

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

DON PRINCE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. No. 97-4329

DON PRINCE,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

No. 97-4334

ROGER DEWITT PRINCE, a/k/a Bill Prince, a/k/a Ike Davis,
Defendant-Appellant.

Appeals from the United States District Court for the District of South Carolina, at Columbia. Joseph F. Anderson Jr., District Judge. (CR-96-122)

Argued: June 8, 1999

Decided: July 20, 1999

Before MURNAGHAN, LUTTIG, and MOTZ, Circuit Judges.

Affirmed by unpublished per curiam opinion.

APPENDIX A

COUNSEL

ARGUED: Jack Bruce Swerling, Columbia, South Carolina, for Appellants. John Michael Barton, Assistant United States Attorney, Columbia, South Carolina, for Appellee. **ON BRIEF:** Jack W. Lawson, Florence, South Carolina, for Appellant Roger Prince. J. Rene Josey, United States Attorney, Scarlett Wilson, Assistant United States Attorney, Columbia, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

A jury convicted two brothers, Don Prince and Roger Dewitt ("Bill") Prince, of conspiring in a murder-for-hire scheme directed at killing two persons expected to testify against Bill in connection with an earlier contract murder. Both brothers appeal, asserting that numerous errors require reversal of their convictions and sentences. Finding no reversible error, we affirm.

I.

In 1992, a South Carolina state court tried and convicted Bill Prince, along with Charlie Dorn Smith, of conspiracy and solicitation of the murder of Bill's foster father, Billy Graham. Evidence at that trial showed that Prince and Smith hired a man to kill Graham to eliminate their $259,000 debt to him and to collect on a $500,000 life insurance policy on Graham. Frederick "Peaches" Andrews testified as to Prince and Smith's involvement in Graham's murder.

Prince and Smith appealed their convictions; Prince remained free on bond during the appeal period. The South Carolina Supreme Court reversed Smith's conviction, but affirmed Prince's. Shortly thereafter,

Prince learned he had cancer. He petitioned for rehearing, but the court denied that petition on August 26, 1994. Rather than turning himself in the Monday after the petition for rehearing was denied, Bill Prince left town and remained a fugitive until his capture almost a year later.

Don Prince, Bill's brother, helped Bill evade law enforcement during the year that Bill was a fugitive. Don brought Bill, who was very ill, back to the United States from Puerto Rico, visited Bill, kept in telephone contact with Bill, ran Bill's businesses for him, arranged doctor's appointments for Bill, and found places for Bill to live. When Don's ex girlfriend learned of Don and Bill's scheme to keep Bill out of jail, Don threatened her to keep her quiet. Don worked with Bill's lawyers on new trial motions and post conviction relief; he attempted to obtain sworn affidavits to assist in these efforts. Don testified at trial, admitting that he assisted Bill in these ways while Bill was a fugitive but explaining that he did so because he loved his brother and wanted to help him during his sickness. Don also testified that he frequently urged Bill to turn himself in.

After state authorities arrested Bill in August 1995, Don, who lived and worked in North Carolina, frequently visited Bill in prison in South Carolina. Don continued managing Bill's affairs and continued to attempt to acquire affidavits in an effort to obtain a new trial for Bill. Don testified to talking to T. Cross, who told Don that he could obtain an affidavit from Peaches Andrews recanting his testimony in the Billy Graham trial. Don had an affidavit prepared and gave it to T. Cross, but Andrews never signed the affidavit. Don also testified to his attempts to obtain an affidavit from Charlie Dorn Smith, who had given an affidavit in 1991 that was helpful to Bill; Don believed that Smith would sign another more detailed affidavit. Don visited Smith and had one of the attorneys and others talk to Smith; Smith, however, did not sign the affidavit. In addition, Don obtained statements from some twenty other witnesses. Various attorneys confirmed that they worked with Don to obtain the affidavits to provide grounds to obtain a new trial for Bill.

In late summer while imprisoned, Bill told Don that he had a friend, a former fellow inmate in state prison, Scott Sherpinskas, who could get the Andrews and Smith affidavits signed. Actually, Sherpin-

skas was an FBI informant. After talking with Bill, Sherpinskas contacted Special Agent Rob Waizenhofer telling him that Bill and Don Prince wanted to hire someone to kill Peaches Andrews and Charlie Dorn Smith. According to Sherpinskas, he and Bill Prince began discussing the contract murders of Andrews and Smith in October 1995. Bill wanted to murder Smith because he believed that Smith had orchestrated the lawsuit that Bill's son, Dewitt, had recently filed to obtain control of his father's business. Bill presumably wanted to kill Andrews because of his testimony in Bill's first trial and his subsequent unwillingness to recant. Bill came up with the idea of having Andrews killed, with Dewitt and Smith's murders to follow. After more thought, Bill decided not to kill Dewitt but to have him framed for possessing heroin in hopes of distracting him from pursuing the lawsuit. Bill assured Sherpinskas that his brother Don would travel from North Carolina to pay Sherpinskas's hit man in South Carolina. Bill also told Sherpinskas that his brother Don was going to find someone else to commit the murders if Sherpinskas could not find someone to do it.

As proof of the Princes' murder-for-hire plot, the Government presented another witness, George Thomas Young, who was imprisoned with Bill Prince during the Fall of 1995. (Young did not know of the plot with Sherpinskas and Sherpinskas did not know of the plot with Young.) Young testified that Bill asked him to arrange to murder Andrews and Smith after Young got out of jail on December 1, 1995, in exchange for a pay-off from Don. Bill gave Young maps to Smith's girlfriend's house as well as to Andrews' house and explained that Don would help Young find the houses and would pay Young for the murders. Don acknowledged that Bill introduced him to Young as a "friend," while Young was still imprisoned, but Don disclaimed all knowledge of the two murder plots.

Upon Young's release from prison, Don, after traveling from North to South Carolina, met with Young and showed him the residences of Smith's girlfriend and of Andrews. Don paid Young approximately $2,000 and gave him telephone charge cards to use for calling Don. Don admitted giving the money and telephone cards to Young at his brother's request, explaining that his brother Bill was extremely generous and often told him to distribute or send money to inmate friends. Using the charge cards, Young frequently contacted Don dur

ing Young's first week of release, and Don telephoned Young on at least one occasion. According to Young, he also met with Don to discuss the murder plots on December 7. Young's wife and a neighbor corroborated the fact that Young met with Don and that Young had a map of Smith's girlfriend's house. The evidence showed that Young accurately described the homes of Peaches Andrews and Smith's girlfriend.

On December 8, 1995, Sherpinskas pretended that he had arranged to have a hit man murder Andrews and showed Bill a staged photograph depicting the dead body of Peaches Andrews. Bill negotiated with Sherpinskas as to the amount owing for Andrews's murder and the down payment for Smith's murder. Bill assured Sherpinskas that Don would make the payments to Sherpinskas's chosen hit man. Bill and Sherpinskas came up with the code word "Turbeville" for Don to use so that the hit man would know and recognize Don.

When Don arrived at the prearranged location, a rest stop area off Interstate 20, he asked the hit man (actually undercover FBI Agent Bruce Otterbacher who taped their conversation), "You don't know how to get to Turbeville, do you?" Don and Otterbacher discussed the payoff and Don told him to get rid of the envelopes that contained the $5,000 payoff. Otterbacher asked Don if he had seen the newspaper story reporting the disappearance of Peaches Andrews and Don told him that he had been called earlier that morning about the article. Otterbacher talked about the "first deal" and the "second one." Don told the agent "he wants you to hold off on the second one." The agent replied, "he doesn't want me to do Smith?" Don answered, "no, he wants you to hold on it . . . he wants everything on hold" because "things are buzzing about this." There was a mix-up regarding the payments and the agent asked Don when he could talk to his brother Bill and clear the matter up. Don demurred, explaining, "I don't like to talk a lot to him on the telephone because when he was on the run all my lines were bugged . . . and they still may be."

After Don paid the agent, law enforcement officers arrested him. The police reported that Don then stated in a disgusted voice, "The things you would do for your brother." In the weeks after Don's arrests, the Government obtained search warrants for Don's office,

home, boat, and car. The Government introduced at trial several incriminating letters and documents obtained from those searches.

The brothers (mostly Don) lodge numerous arguments as to why their convictions must be reversed.

II.

Both brothers initially object to the district court's refusal to redact a tape recording and transcript of a conversation between Bill and a Government informant in order to omit Bill's use of the word "niggers." They rightly note that this pejorative word had no probative value and was likely to be prejudicial to them.

The Government suggests that the district court offered to allow the defense to use its own version of the transcript, which lacked the epithet. But in fact, the court offered only to allow the admission of the defendant's transcript in addition to the transcript prepared by the Government, which did contain the epithet. As the district court observed, this approach would almost certainly have had the effect of making the epithet more conspicuous, and thus the brothers' refusal to agree to it cannot be considered a rejection of a solution to the problem.

The Government also suggests that redaction is unnecessary in this case because the epithet was isolated, redaction would have delayed the trial, and the defense had failed to seek redaction before trial even though it had access to the tape for several weeks. The primary reason the defense failed to request redaction earlier, however, appears to be that its transcript of the tape never included the word. Although at trial the Government asserted that redaction would take "all afternoon," that statement seems to have been based primarily on its concern that new transcripts would have to be made, and the district court indicated that new transcripts could be made quickly and easily. Accordingly, we find the Government's argument that the epithet was properly admitted because redaction would have caused unjustifiable delay unpersuasive.

However, we believe that the error in failing to redact the statement was harmless because of the district court's careful jury instruction.

"We generally presume that a jury will follow cautionary instructions regarding potentially prejudicial evidence." United States v. Love, 134 F.3d 595, 603 (4th Cir. 1998). The district court instructed the jury not to allow the offensive language in the tape influence its conclusions. This instruction was sufficient to eliminate the relatively mod est prejudicial effect that this isolated epithet might otherwise have had on the jury.

III.

While in prison, Bill sent a letter to his wife, which contains the following passage:

> Please keep me posted on Pam [Don's daughter] and Scott's kids. I sure hope Jillian will be well soon. I know they are really hurt with everything that is going on. But I hope they will understand that everything is my fault. I will never be able to forgive myself for the problems that I have caused everybody. But if it would be any consolation, I would have done the same for Don.

(Emphasis added). The district court concluded that this letter constituted proper admissible evidence against Bill, but not against Don. Neither of those rulings is challenged on appeal.

What Don does challenge is the district court's refusal to sever his trial from Bill's. Don contends that the emphasized sentence in the letter facially and powerfully incriminates him. For this reason, he asserts that its admission at their joint trial violates the rule established in Bruton v. United States, 391 U.S. 123 (1968). In Bruton, the Supreme Court held that admission at a defendant's trial of the confession of a non-testifying co-defendant, which is"powerfully incriminating" of the defendant, violates the defendant's Sixth Amendment right to confront adverse witnesses. Id. at 135. A cautionary instruction by the trial court cannot cure such a violation and if such evidence is to be admitted against the co-defendant, severance of the defendants' trials is necessary. Id.

Subsequently, in Richardson v. Marsh, 481 U.S. 200 (1987), however, the Court clarified that a jury instruction can prevent or cure a

Sixth Amendment violation where the proffered statement does not expressly implicate the defendant, but only becomes incriminating by virtue of an inference from other evidence. The Court explained:

> Where the necessity of such linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence. Specific testimony that "the defendant helped me commit the crime" is more vivid than inferential incrimination, and hence more difficult to thrust out of mind. Moreover, with regard to such an explicit statement the only issue is, plain and simply, whether the jury can possibly be expected to forget it in assessing the defendant's guilt; whereas with regard to inferential incrimination the judge's instruction may well be successful in dissuading the jury from entering onto the path of inference in the first place, so that there is no incrimination to forget.

Id. at 208.

The Richardson Court emphasized that the statement at issue there omitted all reference to the existence of the defendant; of course, here, the challenged statement does expressly name Don. Moreover, the Richardson Court rationalized its distinction between "facially incriminating" statements and statements "requiring linkage" by noting that a rule limiting the application of Bruton to the former could be "complied with by redaction - a possibility suggested in that opinion itself." Id. at 208-09. Here, redaction of the last sentence would have entirely remedied the problem; however, neither the parties nor the district judge considered redaction. They only discussed exclusion of the entire letter, severing Don's trial from Bill's, or admission of the letter with an instruction that the jury was only to consider it as evidence against Bill. (Don rejected the instruction.)

Thus, the case at hand differs from Richardson. However, Don cannot prevail based on these distinctions because Bruton does not mandate severance unless evidence "powerfully incriminates" a defendant. In Bruton, the co-defendant directly inculpated the petitioner by stating essentially that "we committed the crime." Here, on the other hand, the challenged passage does not powerfully incriminate Don.

To be sure, in light of the evidence presented in this case, a juror could conclude that "the same" Bill would have done for Don referred to the crime charged against Don -- conspiring to murder the witnesses against his brother. Even if all evidence of Don's aid to Bill while Bill was a fugitive was excluded, see infra at 11-12, the Government presented abundant evidence that while Bill was imprisoned, Don visited and telephoned Bill frequently, ran his businesses, and worked feverishly to obtain the affidavits believed necessary for Bill's new trial. Indeed, Don testified at trial and freely admitted to the considerable efforts he made on his brother's behalf.

If Don was, as he claimed, not guilty of the crime charged, Bill might well have especially regretted and so particularly apologized to the family for the fact that Don's innocent assistance to him could be used as circumstantial evidence tying Don to Bill's criminal conspiracy. The statement in Bill's letter is not in any way inconsistent with Don's defense that he extensively assisted his brother but never participated in any murder-for-hire plot. The statement, standing alone, simply does not powerfully incriminate Don.

IV.

Don also challenges the search warrants used by the Government to search his car, home, boat, and office. He contends that the warrants were supported by false information, were not based on probable cause, and were overbroad.

We have carefully examined the affidavits and warrants. We have no difficulty concluding that the affidavits contained no information known by the officers to be materially false. Similarly, those affidavits provide ample probable cause to justify issuance of the warrants.

Some portions of the warrants do, however, contain broad boilerplate language authorizing seizure of every conceivable item without tying these items to the alleged crimes or circumstances of the case. However, the first two categories of "items to be seized" listed in the warrant are specifically identified, i.e."life insurance policies, business transactions, and/or communications involving" Bill, Don, and their allegedly intended victims, and documents"evidencing the fraudulent or illegal acquisition of life insurance policies or the pro-

ceeds thereof." These two categories are certainly described with adequate particularity. See United States v. Fawole, 785 F.2d 1141, 1144 (4th Cir. 1986).

We have held that, in order to avoid the suppression of lawfully seized evidence, a warrant that properly identifies some items "will not be defeated by [other] ambiguous or conclusionary language" so long as the warrant was "sufficiently particularized with respect to the items seized." United States v. Jacob, 657 F.2d 49, 52 (4th Cir. 1981). In other words a court will "sever" the too general portion of the warrant from the sufficiently specific portion. See United States v. George, 975 F.2d 72, 79 (2d Cir. 1992). A search"conducted pursuant to a warrant held unconstitutional in part does not invalidate the entire search [and] only those items seized beyond the warrant's scope will be suppressed." Id. ("'the remedy with respect to any items exceeding the scope of the warrant [is not] invalidation of the search but suppression of those items.'") (quoting United States v. Dunaloy, 584 F.2d 6, 11 n.4 (2d Cir. 1978)).

Don has pointed to no evidence used by the Government at trial that did not fall into the properly identified first two categories of the warrant. The evidence obtained pursuant to the lawful portion of the warrant was rightly admitted, the remainder of the warrant, while too broad, provides no basis for reversal.

V.

Don maintains that the district court erred in admitting, over his objection, evidence of Bill's prior murder conviction; evidence that Bill was a beneficiary of the insurance policies held by the victim of that murder, Billy Graham, and by one of the intended victims of the instant murder-for-hire scheme; evidence that Don helped Bill collect on Graham's policy; evidence that Don helped Bill when he was a fugitive; evidence, including the complaint, of a lawsuit brought against Don by his nephew; and evidence of threats allegedly made by Don against a woman who later testified at trial for the Government. Don asserts that the admission of this evidence violated Federal Rule of Evidence 404(b), in that it simply constituted evidence of bad character with no other legitimate evidentiary purpose, and Rule 403, in that its prejudicial effect outweighed its probative value.

Rule 404(b) permits admission of evidence necessary to prove "motive, opportunity, preparation, plan, knowledge, identity or absence of mistake or accident." United States v. Bailey, 990 F.2d 119, 122 (4th Cir. 1993). Also admissible is evidence of bad acts that arise out of the same series of transactions as the charged offense and is "necessary to complete the story of the crime," United States v. Kennedy, 32 F.3d 876, 885 (4th Cir. 1994), evidence inextricably intertwined with the charged crime, United States v. Chin, 83 F.3d 83, 88 (4th Cir. 1996), or evidence "elicited as part of the groundwork that the government needed to lay to explain to the jury how . . . individuals fit into the operation of [a] conspiracy." United States v. McMillon, 14 F.3d 948, 955 (4th Cir. 1994). It is well established that evidence of these kinds does not implicate Rule 404(b)'s prohibition of evidence admitted solely to demonstrate bad character. See Kennedy, 32 F.3d at 886; Chin, 83 F.3d at 88; McMillon, 14 F.3d at 955.

We fail to see what bearing Bill's murder conviction and his status as a beneficiary of the insurance policies would have on the matter of Don's character, and thus we doubt that this evidence even raises a question under Rule 404(b). The evidence concerning Bill and the insurance policies certainly has no such significance in itself. Assuming that Bill's prior murder conviction could have subjected Don to inferences of guilt or bad character by association, that evidence was plainly admissible as evidence necessary to complete the story of the crime. See Kennedy, 32 F.3d at 885. Similarly, the evidence concerning the lawsuit was properly admitted to illustrate Don's motive and intent to kill Smith. Likewise, Don's threatening statements to his ex girlfriend was evidence of his intent, preparation, plan, and absence of any mistake. Nor did any of this evidence unfairly prejudice Don.

The evidence that Don helped Bill collect on the Graham policy and that Don helped Bill while he was a fugitive, by contrast, should have been excluded. This evidence could have been omitted without adversely affecting a complete presentation of the story of the crime alleged against Don, i.e., conspiracy to murder the witnesses. The assistance Don gave Bill when he was a fugitive manifestly was not part of the same criminal episode as the conspiracy to murder the witnesses; the "criminal episode" surrounding Bill's flight from justice terminated when Bill was captured, and there is nothing to indicate

that Bill planned to murder the witnesses before then. Thus, evidence of Don's assistance to Bill while he was a fugitive was not admissible as evidence of acts constituting "necessary preliminaries" to the conspiracy, acts "inextricably intertwined" with it, acts forming part of a single criminal episode containing the alleged crime, Chin, 83 F.3d at 88, or acts arising out of the same series of transactions, Kennedy, 32 F.3d at 885.

It is difficult to see what probative value this evidence could have had other than to suggest that Don had previously been involved in Bill's unlawful activity, and that Don was therefore likely to have conspired with his brother in the charged conspiracy. The only justifications that the Government offers for this evidence are that it "allowed the jury to fully understand the extent of the conspiracy and the illegal methods used by him and Bill in reaching the goal of their conspiracy," and that it "shows how the Prince brothers established a relationship of trust through their activities and how these events flowered into the charged crimes." Brief of Appellant at 33. The former assertion falsely implies that the prior bad acts were part of the conspiracy alleged, and the latter in effect creates a new exception to Rule 404(b) that would allow a defendant's prior bad acts in conjunction with a co-defendant, whatever their nature, to be admitted in virtually every instance.

In sum, even if this evidence could survive scrutiny under Rule 404(b), it would nonetheless be inadmissible under Rule 403 because its prejudicial effect would outweigh whatever modest probative value it might have. However, even where the trial court abuses its discretion in admitting bad character evidence, such error may be harmless. See United States v. Kenny, 973 F.2d 339, 344 (4th Cir. 1992). In deciding the harmlessness of an error we must determine "whether we can say that we believe that it is 'highly probable that the error did not affect the judgment.'" United States v. Madden, 38 F.3d 747, 753 (4th Cir. 1994) (quoting United States v. Nyman, 649 F.2d 208, 212 (4th Cir. 1980)). In light of the voluminous properly admitted evidence detailed above against Don, we have no difficulty finding that the error here did not affect the judgment and was therefore harmless.

VI.

Don asserts that the district court erred by instructing the jury that "[i]t does not matter whether the interstate travel took place before or after the murder occurred or was supposed to have occurred," because the statute criminalizes interstate travel with an intent that murder "be committed," not interstate travel following a murder.

Don maintains that the meeting in which he gave money to the Government agent occurred after the victim to whom the payment allegedly related, Peaches Andrews, was already believed to be dead. Even if the Government cannot rely on evidence of travel post-murder, a question we need not decide here, this does not assist Don in light of the fact that the Government produced evidence tending to show that Don traveled interstate to further the plan to murder Andrews before he came to believe Andrews was dead. The evidence indicated, for example, that Don could not have believed Andrews was dead prior to December 8, and that Don drove from North to South Carolina on December 1 to meet with an individual concerning Andrews's murder.

VII.

We have carefully reviewed Don's other arguments as to why his conviction must be reversed and find them all meritless. There remains only Don's assertion that the district court improperly enhanced his sentence for obstruction of justice under U.S.S.G. § 3C1.1.

On appeal, Don essentially contends that there was insufficient evidence for the district court to find that he gave false testimony when he took the stand. The district judge made a finding at the sentencing hearing that Don had lied at trial when he testified that the money he gave to the hit man was paid for the purpose of obtaining affidavits to help secure a new trial for Bill. The district court relied heavily on the audio tape of the meeting at the interstate rest area between Don and Agent Otterbacher. Though the court noted that "the parties [on the tape] used guarded language and code words," it also noted that "[i]t was obvious they were talking about something that was somewhat nefarious" and that there was no reference on the tape to any sort

of affidavit. Indeed, the tape contains interchanges between Don and the undercover agent that seem surely related to the plot to murder Peaches Andrews and Smith, not to affidavits. For instance, when Otterbacher complained about the amount of money Don had brought, the following exchange took place:

> Otterbacher: I was supposed to get five thousand for the first deal, okay. That was up front and I was supposed to get five thousand more cut in half and you guys were gonna hold on to half of it for the second one.
>
> Don: Yeah, but [Bill] wants you to hold off on the second one.
>
> Otterbacher: Oh, he doesn't want me to do Smith?
>
> Don: No, no, no, no, no he [Bill] wants to hold on it.
>
> Otterbacher: I thought he wanted him done in a couple days.
>
> Don: No, no, no, no, he wants you to hold him. He wants you to hold on him . . . .

The discussion on the tape in conjunction with the trial testimony of Sherpinskas, who arranged the meeting, convince us that the district court did not commit clear error when it found that Don had lied on the stand about this meeting. Thus there was sufficient evidence to support the district court's obstruction of justice enhancement.

In his reply brief, Don additionally contends that the sentencing judge failed to follow the requirements of United States v. Dunnigan, 507 U.S. 87 (1993). Dunnigan directs that in order to impose an enhancement for obstruction of justice, a court must make a "finding . . . of an obstruction of, or impediment to, justice that encompasses all of the factual predicates for a finding of perjury." Id. at 95. The "factual predicates" consist of at least the main elements of the Court's definition of perjury: falsity, materiality, and intent. See id. at 94. Don contends that in this case the district court found only that Don committed "perjury," and made no specific findings on two of the factual predicates, namely intent to testify falsely and materiality.

Whether the district court's finding was sufficient under Dunnigan presents a close question. However, this circuit has long held that we will not address new arguments raised for the first time in the reply brief. See Hunt v. Nuth, 57 F.3d 1327, 1338 (4th Cir. 1995). Don has thus waived his Dunnigan argument; the obstruction of justice enhancement was not otherwise in error.

AFFIRMED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
August 17, 1999

No. 97-4329
CR-96-122

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

DON PRINCE

Defendant - Appellant

No. 97-4334
CR-96-122

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

ROGER DEWITT PRINCE, a/k/a Bill Prince, a/k/a Ike Davis

Defendant - Appellant

O R D E R

The appellants have filed a petition for rehearing.

The Court denies the petition for rehearing.

For the Court,

/s/ Patricia S. Connor

CLERK

United States District Court
District of South Carolina

UNITED STATES OF AMERICA

vs.

Don Prince

THE DEFENDANT:

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 3:96-122-2

_Jack Swerling, Esquire, Retained___
Defendant's Attorney

[illegible]INED

FILED
APR 17 1997
LARRY W. PROPES, CLERK
COLUMBIA, S.C.

ENTERED
4/17/97
BW

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

■ was found guilty on count(s) 1, 2 and 3 on July 16, 1996 after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC 1958(a)	SEE THE INDICTMENT	12/14/95	1
18 USC 1958(a)	SEE THE INDICTMENT	12/14/95	2
18 USC 1958(a)	SEE THE INDICTMENT	12/14/95	3

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _ is/are dismissed on the motion of the United States.
IT IS ORDERED that defendant pay a Special Assessment of $150.00 whichj shall be due immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 243-50-9510
Defendant's Date of Birth: April 5, 1938
Defendant's USM No.: 95186-071

Defendant's Residence Address:
5 Bahama Drive
Wrightsville Beach, N. C. 28406

Defendant's Mailing Address:
5 Bahama Drive
Wrightsville Beach, N. C. 28406

April 15, 1997
Date of Imposition of Judgment

Signature of Judicial Officer

JOSEPH F. ANDERSON, JR., U.S. DISTRICT JUDGE
Name and Title of Judicial Officer

4/16/97
Date

A TRUE COPY
Attest: Larry [illegible]
By: Becky Wilson
DEPUTY CLERK

APPENDIX C

DEFENDANT: Don Prince
CASE NUMBER: 3:96-122-2

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of Two Hundred Eleven (211) Months. This sentence consists of One Hundred Twenty (120 Months, as to Count 1; Ninety-one (91) Months, as to Count 2 which shall run consecutive to sentence imposed in Count 1; and Ninety-one (91) Months, as to Count 3 which shall run concurrently with sentences imposed in Counts 1 and 2.
TOTAL: 211 Months.

This sentence is imposed pursuant to the provisions of Sec. 5G1.2.

■ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:
- ☐ at _ a.m./p.m. on .
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
- ☐ before 2 p.m. on _.
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this Judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy United States Marshal

DEFENDANT: Don Prince
CASE NUMBER: 3:96-122-2

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Three (3) Years, concurrent as to each of Counts 1, 2 and 3. TOTAL: 3 YEARS.

. The defendant shall also comply with the additional conditions.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

■ The defendant shall not possess a firearm as defined in 18 U.S.C. §921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Don Prince
CASE NUMBER: 3:96-122-2

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$ 150.00	$ 5,000.00	$

☐ If applicable, restitution amount ordered pursuant to plea agreement ..... $_____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $__.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 5, Part B, may be subject to penalties for default and delinquency pursuant to 18 U.S.C. §3612(g).

■ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

■ The interest requirement is waived.

☐ The interest requirement is modified as follows:

RESTITUTION

☐ The determination of restitution is deferred, until _____. An Amended Judgment in a Criminal Case will be entered after such a determination.

☐ The defendant shall make restitution to the following payees in the amounts listed below.
If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	**Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals:	$_	$_____	

**Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Don Prince
CASE NUMBER: 3:96-122-2

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ☐ in full immediately; or

B ■ $150.00 immediately, balance due (in accordance with C, D or E); or

C ☐ not later than; or

D ☐ in installments to commence day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. Probation Officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E ■ $5,000.00 fine to be paid through participation in the Inmate Financial Responsibility Program..

The Defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:
Defendant to participate in the Inmate Financial Responsibility Program for payment of $5,000.00 fine.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program are to be made as directed by the court, the Probation Officer or the United States Attorney.

DEFENDANT: Don Prince
CASE NUMBER: 3:96-122-2

STATEMENT OF REASONS

■ The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 36

Criminal History Category: I

Imprisonment Range: 188 to 235 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 17,500.00 to $ 175,000.00

■ Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $N/A

☐ Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. §3663(d).

☐ For offenses committed on or after Sept. 14, 1994 but before April 23, 1996, that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

☐ Partial restitution is ordered for the following reason(s):

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

■ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s): Seriousness of crime as revealed in Presentence Report.

OR

☐ The sentence departs from the guideline range:

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following specific reason(s):

FACILITIES IN ADDITION TO TRAVEL.

MR. MOORE: YOUR HONOR, I THINK IT'S SAFER TO CHARGE IT THE WAY YOU HAVE IT CHARGED. I THINK WE ARE BETTER OFF ARGUING THE TRAVEL, NOT ARGUING THE USE OF INTERSTATE FACILITIES.

THE COURT: I THINK THAT LIMITS YOU TO THE INDICTMENT ANYWAY.

MR. MOORE: IT IS A MORE PRUDENT COURSE OF CONDUCT.

THE COURT: THE SECOND QUESTION REGARDING THE CONSPIRACY COUNTS, THE INDICTMENT ONLY ALLEGES TWO CONSPIRATORS. AND SO I HAVE THE STANDARD CONSPIRACY CHARGE, TELLS THE JURY THAT THE GOVERNMENT MUST PROVE THAT TWO OR MORE PEOPLE FORMED A CONSPIRACY, AND THAT DEFENDANTS, AT SOME TIME, JOINED THE CONSPIRACY, ET CETERA, ET CETERA.

BUT I THINK HERE, I JUST NEED TO SAY THE GOVERNMENT MUST PROVE THAT THE TWO DEFENDANTS FORMED A CONSPIRACY. THERE'S NO ALLEGATION THAT ANYONE ELSE WAS A MEMBER OF THE CONSPIRACY; AM I CORRECT?

MR. MOORE: BEG ONE MOMENT, YOUR HONOR.

(PAUSE IN PROCEEDINGS.)

MR. MOORE: YOUR HONOR, MS. WILSON TELLS ME THE TAPES REFER TO HAVING SOMEONE ELSE GOING TO CHECK ON PEACHY AND CHECK ON PEACHY'S STUFF, SEE IF PEACHY WAS, IN FACT, DEAD.

I THINK --

THE COURT: WHAT ABOUT -- WHAT IS THE LAW ON

GOVERNMENT UNDERCOVER AGENTS? THEY CANNOT BE CONSPIRATORS?

MR. MOORE: THEY CANNOT BE, SO, MR. -- JUST ALL THOSE ARE OUT, THEY CAN'T BE CONSPIRACIES.

MR. MOORE: YOUNG WAS NOT A GOVERNMENT AGENT AT THE TIME HE PARTICIPATED IN THESE ACTS. I GUESS YOU COULD ARGUE IF YOU BELIEVE HIS TESTIMONY IN FULL, YOU COULD BELIEVE THAT HE WAS NOT REALLY A CO-CONSPIRATOR, BECAUSE HE WAS SCAMMING. THE JURY COULD PROBABLY CONCLUDE, HOWEVER, THAT HE WAS A CO-CONSPIRATOR, AND THAT HE WAS TELLING THE TRUTH.

AS YOU KNOW, YOUR HONOR, THE JURY IS FREE TO BELIEVE ALL OR PART OF A WITNESS' TESTIMONY. AND THEY COULD BELIEVE THAT HE REALLY DID COMMIT THESE ACTS, BUT HE REALLY DID INTEND TO HELP THESE GUYS COMMIT THE MURDER. AT SOME POINT MAY HAVE CHANGED HIS INTENTION.

I THINK, YOUR HONOR, YOU SHOULD TELL THE JURY THAT THE GOVERNMENT HAS TO PROVE THAT TWO OR MORE PERSONS, NOT JUST THE DEFENDANTS, BUT TWO OR MORE PERSONS COMBINED TO COMMIT OR CONSPIRED.

THE COURT: THAT'S THE WAY IT READS IN WHAT YOU HAVE BEEN GIVEN. LET ME GIVE THAT SOME MORE THOUGHT. WE'LL TAKE THAT UP LATER.

MR. SWERLING: JUDGE, I POINT OUT THAT THE INDICTMENT IS UNIQUE IN THIS CASE. IT DOES NOT EVEN ALLEGE, AS OTHERS AND MOST INDICTMENTS DO, IT'S ONLY TWO OF THEM ALLEGED.

THE COURT: I NOTICED THAT; YOU ARE RIGHT.

(PAUSE IN PROCEEDINGS.)

THE COURT: MR. SWERLING, I DIDN'T NOTICE THAT.

MR. LAWSON: I SAW HER, I THOUGHT THAT'S WHAT IT WAS, SHE NEEDED TO GO. I THINK SHE WAS TRYING TO EYE SOMEBODY, BUT

THE COURT: I WOULD STOP IF I HAD SEEN HER. LET ME JUST RAISE ONE QUESTION ON THE JURY INSTRUCTIONS, A BOILER-PLATE PAGE THAT SAYS YOU GOT TO CONSIDER EACH COUNT O N EACH DEFENDANT INDIVIDUALLY. AND THERE'S A SENTENCE SAYS THE FACT YOU MAY FIND ONE OR MORE OF THE DEFENDANTS GUILTY OR NOT GUILTY OF ANY OFFENSES SHOULD NOT AFFECT YOUR VERDICT TO ANY OTHER OFFENSE.

WELL, TECHNICALLY, IF THEY FIND GUILT ON COUNT ONE OR TWO, IT'S GOT TO BE AGAINST BOTH DEFENDANTS; RIGHT?

MR. SWERLING: COUNT --

THE COURT: THE CONSPIRACY COUNTS COULDN'T FIND ONE GUILTY, THE OTHER NOT GUILTY ON CONSPIRACY.

MR. SWERLING: THAT WOULD BE MY VIEW.

THE COURT: SO, I THINK THAT SENTENCE MAY NEED TO COME OUT. JUST LEAVE THE CONCEPT A SEPARATE CRIME OR OFFENSE IS CHARGED AGAINST THE DEFENDANTS IN EACH COUNT, EACH OFFENSE. AND THE EVIDENCE PERTAINING TO IT SHOULD BE CONSIDERED SEPARATELY.

ALSO THE CASE OF EACH DEFENDANT SHOULD BE CONSIDERED SEPARATELY AND INDIVIDUALLY, PERIOD. STOP IT RIGHT THERE. AND

DON'T SAY THE FACT THAT YOU MAY FIND ONE OR MORE DEFENDANTS GUILTY ON ANY ONE COUNT SHOULD NOT AFFECT YOUR VERDICT AS TO THE OTHER DEFENDANT.

MR. SWERLING: ISN'T THAT SOMETHING YOU COULD CORRECT AT THE END OF THE CASE, IF THEY CAME BACK WITH A VERDICT ON ONE AND NOT THE OTHER ON CONSPIRACY? I'M RELUCTANT TO LET THE JURY -- RELUCTANT TO TRY AND EXPLAIN THAT TO THEM. BECAUSE IT WOULD BE COMPLICATED.

THE COURT: I NEVER HAD A CONSPIRACY BEFORE THAT WAS CLOSED IN.

MR. SWERLING: I DON'T THINK I HAVE EITHER.

THE COURT: THAT'S THE PROBLEM, CONSPIRACY OTHER ALLEGED MEMBERS IT WOULD BE POSSIBLE TO FIND JUST ONE OF THE TWO DEFENDANTS GUILTY. BUT, MS. WILSON, MR. JOSEY, DON'T YOU AGREE THAT IT IS UP OR DOWN ALL OR NOTHING ON COUNTS ONE AND TWO?

MS. WILSON: YOUR HONOR, I UNDERSTAND WHAT YOU'RE SAYING. BUT I KNOW THAT ALL THE TIME JURIES COME BACK WITH INCONSISTENT VERDICTS. AND THIS COULD BE ONE OF THOSE SITUATIONS. BUT I UNDERSTAND.

THE COURT: I KNOW. I'M TRYING TO MAKE IN ADVANCE PREVENT THAT FROM HAPPENING, IF I CAN.

MS. WILSON: WELL, I THINK THEY HAVE A RIGHT TO HAVE AN INCONSISTENT VERDICT, IF THEY WANT TO.

THE COURT: WHAT DO WE DO -- HYPOTHETICALLY, IF THEY

CONVICT ONE DEFENDANT, NOT THE OTHER ON COUNT ONE.

MS. WILSON: NOTHING.

MR. SWERLING: RULE 29.

MR. MOORE: THEN WE ARGUE ABOUT WHETHER IT IS INCONSISTENT VERDICT, AT THAT POINT. I HESITATE TO PUT THE CART BEFORE THE HORSE.

THE COURT: THAT'S GETTING TOO FAR AHEAD. WHAT DO I NEED TO SAY IN THE CHARGE?

MR. SWERLING: EXPLAIN TO THEM RULE 32.

THE COURT: I THINK IF WE JUST TAKE OUT THAT SENTENCE -- THE SENTENCE I'M CONCERNED ABOUT, LET ME JUST QUOTE IT: THE FACT THAT YOU -- THE FACT THAT -- I THINK PAGE 32 -- I THINK PAGE 32, THE LAST SENTENCE OF THE FIRST PARAGRAPH.

MS. WILSON: THAT'S FINE, YOUR HONOR.

THE COURT: JUST TAKE THAT SENTENCE OUT. WE STILL HAVE THE CONCEPT THAT YOU GOT TO LOOK AT EACH COUNT AND THE EVIDENCE ON EACH DEFENDANT SEPARATELY AND INDEPENDENTLY.

MR. SWERLING: CAN I THINK ABOUT IT?

THE COURT: ALL RIGHT.

(PAUSE IN PROCEEDINGS.)

THE COURT: I JUST LIKE THAT LAST SENTENCE COMING OUT WOULD CORRECT THE PROBLEM. DO WE HAVE AGREEMENT THAT THE ALTERNATES LISTED ON THE LAST PAGE ARE, IN FACT, THE ALTERNATES? I ALWAYS WORRY ABOUT HAVING A LITTLE SNAFOO, WOULD YOU CHECK DOUBLE CHECK.

THE COURT: ALL RIGHT. THE JURY HAS SENT OUT A QUESTION, WHICH READS AS FOLLOWS: IN RELATION TO COUNTS ONE AND TWO REGARDING THE ALLEGED CONSPIRACY, CAN WE RENDER A GUILTY VERDICT FOR ONE DEFENDANT AND/OR A NOT GUILTY VERDICT FOR THE OTHER DEFENDANT?

IT IS A MATTER WE DISCUSSED EARLIER. I THINK THE ANSWER TO THAT QUESTION IS NO.

RIGHT?

I JUST THINK THAT YOU CAN'T CONSPIRE WITH YOURSELF.

MR. SWERLING: JUDGE, AGAIN, I THINK THE POSITION I TOOK BEFORE, I STILL HAVE TO TAKE IT NOW, IS THAT THAT IS SOMETHING YOUR HONOR CAN CURE IN A JUDGMENT TO SET ASIDE THE VERDICT -- MOTION TO SET ASIDE THE VERDICT.

THE COURT: HOW WOULD I CURE IT?

MR. SWERLING: POST-TRIAL MOTION.

THE COURT: BUT I CAN'T CURE SOMEBODY -- SOMEONE WHO HAS BEEN CONVICTED. ONLY WAY TO CURE IT WOULD BE TO SET ASIDE THE CONVICTION OF WHOEVER THEY CONVICTED.

MR. SWERLING: CORRECT, CORRECT.

THE COURT: WELL, I JUST DON'T THINK A JURY SHOULD BE INSTRUCTED IT IS APPROPRIATE TO BRING BACK AN INCONSISTENT VERDICT.

MR. SWERLING: I'M NOT SUGGESTING BRINGING BACK AN INCONSISTENT VERDICT. ALL I'M SUGGESTING IS THAT THEY SHOULD BE REINSTRUCTED WHAT YOU HAD SAID. AND IF SHOULD THEY DO THAT,

THEN YOUR HONOR HAS THE POWER IN POST-TRIAL MOTIONS TO CORRECT IT AS TO IF THERE IS A GUILTY VERDICT AS TO ONE.

THE COURT: WHAT ABOUT FROM THE GOVERNMENT?

MR. MOORE: YOUR HONOR, I AGREE WITH YOUR HONOR. I DON'T THINK THE JURY SHOULD BE INSTRUCTED THEY CAN BRING BACK AN INCONSISTENT VERDICT. I THINK YOU HAVE TO TELL THEM THE ANSWER IS NO.

THE COURT: WELL, SHOULD I GO FURTHER AND SAY THAT IT SAYS A PERSON CANNOT CONSPIRE WITH THEMSELVES? IT TAKES TWO OR MORE PEOPLE TO FORM A CONSPIRACY. IN THIS CASE THE TWO MEMBERS OF THE CONSPIRACY ARE THE TWO DEFENDANTS, AND THOSE TWO ALONE. I MEAN, SHOULD I EXPLAIN THE ANSWER, IN OTHER WORDS?

MR. MOORE: I DON'T HAVE A PROBLEM WITH THAT, JUDGE.

MR. SWERLING: JUDGE, I THINK YOU HAVE IN THE CHARGE.

THE COURT: WELL, I HAVE, THAT'S FOR SURE.

MR. SWERLING: I MEAN, THE CHARGE IS FAIRLY STRAIGHTFORWARD. GOT TO BE TWO OR MORE PEOPLE. ACTUALLY THE CHARGE DOES NOT SAY IT HAS TO BE TWO OR MORE PEOPLE.

THE COURT: IT DOES IN THE LEAD IN, THE LEAD IN, A CONSPIRACY IS KIND OF A PARTNERSHIP OF TWO OR MORE PERSONS TO JOIN TOGETHER TO ACCOMPLISH SOME UNLAWFUL PURPOSE.

I THINK I CAN REPEAT THAT STATEMENT I JUST READ, AND SAY IN LIGHT OF THAT, THE ANSWER TO YOUR QUESTION IS NO. IN OTHER WORDS, I THINK THAT I HAVE THE DISCRETION NOT ONLY TO ANSWER THE SPECIFIC QUESTION THAT IS ASKED, BUT GIVE AN

EXPLANATION AS TO WHY SO THEY WILL UNDERSTAND IT, AND NOT -- I DON'T THINK THERE WOULD BE ANY ERROR IN GIVING A BRIEF EXPLANATION.

SO, OVER THE DEFENDANTS -- MR. LAWSON, YOU HAVE ANY POSITION ON THIS?

MR. LAWSON: YOUR HONOR, I THINK THAT THE APPROPRIATE WAY IS AS YOU DID IN YOUR INITIAL CHARGE, IS TO INSTRUCT THE JURY THAT IN THIS CASE THE CHARGE OF CONSPIRACY AS ALLEGED IN THE INDICTMENT IS A CONSPIRACY CONSISTING OF TWO INDIVIDUALS. AND THAT IF YOU FIND --

THE COURT: WELL, I'M GOING TO GIVE THEM AN ANSWER TO THE QUESTION, GIVE THEM A WATERED DOWN INSTRUCTION ON CONSPIRACY, THAT MAKES IT CLEAR THAT THE CONSPIRACY IS AN AGREEMENT WHICH REQUIRES TWO PEOPLE.

ALL RIGHT.

PLEASE BRING IN THE JURY.

(JURY IN.)

THE COURT: LET ME FIRST ASK WHO FROM AMONGST YOU HAS BEEN SELECTED AS THE FOREPERSON?

THE FOREPERSON: I HAVE.

THE COURT: WHAT IS YOUR NAME?

FOREPERSON: JILL TUCKER.

THE COURT: TUCKER? I'M SORRY. MISS TUCKER AND MEMBERS OF THE JURY: WE RECEIVED IN RELATION TO COUNTS ONE AND TWO, REGARDING THE ALLEGED CONSPIRACY, CAN WE RENDER A VERDICT

FOR ONE DEFENDANT AND/OR A NOT GUILTY VERDICT FOR THE OTHER DEFENDANT?

IN RESPONSE TO THAT, I WOULD SAY THE ANSWER TO THAT QUESTION IS NO. THE REASON FOR THAT ANSWER IS AS FOLLOWS:

YOU WILL RECALL I TOLD YOU IN MY JURY INSTRUCTIONS, A CONSPIRACY IS A KIND OF CRIMINAL PARTNERSHIP A COMBINATION OR A AGREEMENT OF TWO OR MORE PERSONS TO JOIN TOGETHER TO ACCOMPLISH SOME UNLAWFUL PURPOSE.

I ALSO TOLD YOU THAT OF THE FOUR ELEMENTS NECESSARY FOR THE GOVERNMENT TO PROVE BEYOND A REASONABLE DOUBT TO ESTABLISH A CONSPIRACY, THE FIRST OF THOSE ELEMENTS IS THAT THE TWO DEFENDANTS ENTERED INTO THE UNLAWFUL AGREEMENT CHARGED IN THE INDICTMENT BETWEEN ON OR ABOUT OCTOBER FIRST, 1995, AND DECEMBER 14TH, 1995.

THUS, BECAUSE THE ESSENCE OF AN AGREEMENT IS A SITUATION INVOLVES TWO PEOPLE, THE ANSWER TO THE QUESTION YOU HAVE ASKED ME IS NO.

I WOULD ASK THAT YOU NOW RETURN TO YOUR JURY ROOM AND RESUME YOUR DELIBERATIONS.

(JURY OUT.)

THE COURT: ALL RIGHT. OBJECTION FROM EITHER SIDE WHAT I JUST TOLD THE JURY?

MS. WILSON: NONE FROM THE GOVERNMENT, YOUR HONOR.

MR. SWERLING: JUDGE, WHAT I -- I HAVE A PROBLEM WITH NOW, THE JURY DOESN'T HAVE -- THEY HAVE THE ANSWER, BUT THEY

DON'T HAVE ANY GUIDANCE ABOUT IT. BECAUSE IF THEY NEED TO BE INSTRUCTED THAT THE GOVERNMENT HAS ONLY ALLEGED DON AND BILL PRINCE TO BE THE CO-CONSPIRATORS IN THIS CASE. IF THEY FIND THAT ONE OF THEM DID NOT ENTER INTO A CONSPIRACY, THEN THERE IS NO CONSPIRACY.

BUT THE WAY IT WAS EXPLAINED TO THEM, I'M NOT SURE THEY UNDERSTAND WHY. AND, THEREFORE, THEY WOULD HAVE DIFFICULTY --

THE COURT: WELL, YOU WANT ME TO BRING THE JURY BACK AS TO COUNTS ONE AND TWO, THEY ARE BOTH GUILTY OR BOTH NOT GUILTY?

MR. SWERLING: OF CONSPIRACY.

THE COURT: OF CONSPIRACY, COUNT ONE AND TWO.

MR. SWERLING: BECAUSE THE GOVERNMENT HAS ALLEGED THAT THEY WERE THE TWO CONSPIRATORS. IF THEY HAD -- I ALSO LIKE YOUR HONOR TO TELL THEM SOMEHOW THAT THEY ARE NOT CONVINCED BEYOND A REASONABLE DOUBT THAT ONE IS A MEMBER OF THE CONSPIRACY, THEN --

THE COURT: I THINK THAT'S IMPLICIT IN THE WHOLE CHARGE IN WHAT I TOLD THEM.

MR. SWERLING: WELL, THAT'S WHAT I WAS WORRIED ABOUT WHEN YOUR HONOR WAS CHARGING THEM JUST NOW, ISOLATING THAT PORTION OF IT. BUT THEY DON'T UNDERSTAND, AT THIS POINT, I CAN'T IMAGINE THAT THEY WOULD UNDERSTAND WHY BOTH WOULD HAVE THAT -- I DON'T UNDERSTAND, I DON'T THINK THEY UNDERSTAND WHY

THEY CAN'T FIND THEM GUILTY, ONE GUILTY OF CONSPIRACY THE REASON IS BECAUSE THERE'S ONLY TWO PEOPLE.

THE COURT: YEAH, WELL, I DIDN'T TELL THEM WHAT I SAID EARLIER, YOU CAN'T CONSPIRACY WITH YOURSELF. BUT I THINK IT'S IMPLICIT IN WHAT I SAID, IT TAKES TWO PEOPLE -- TWO OR MORE PEOPLE. IN THIS CASE, THE ONLY TWO PEOPLE HAVE BEEN ALLEGED ARE THE TWO DEFENDANTS.

LET ME SAY IN REGARD TO YOUR SUGGESTION THAT WE JUST NOT STRAIGHTEN THEM OUT, TELL THEM THAT, I'LL FIX THE VERDICT IF IT COMES IN INCONSISTENT. I DON'T THINK THAT'S APPROPRIATE WAY TO LOOK AT IT. IF WE, YOU KNOW, FOR EXAMPLE, PICK A DIFFERENT EXAMPLE IN A DIFFERENT CONTEXT, A LOT OF TIMES JURIES COME BACK ASK ME ABOUT PUNITIVE DAMAGES AND WANT MORE GUIDANCE. I WOULDN'T TELL THEM YOU JUST DO WHATEVER YOU THINK IS RIGHT, AND IF IT IS TOO MUCH, I'LL FIX IT LATER. I MEAN, THAT'S JUST NOT THE WAY WE INSTRUCT JURIES.

MR. SWERLING: I WOULDN'T INSTRUCT THE JURY YOU WOULD DO THAT. I THINK IT IS A MATTER OF LAW FOR THE COURT, THE JURY SHOULDN'T HAVE ANY PART OF THAT.

THE COURT: WELL, I'M GOING TO STAND ON WHAT I TOLD THE JURY. I THINK IT ADEQUATELY RESPONDED TO THEIR QUESTION. SO IT IS NOW ALMOST 6:30. LET'S DON'T LEAVE, GO GET DINNER YET. LET'S STICK AROUND FOR ANOTHER 15, 20 MINUTES. AND IF WE DON'T HAVE ANY QUESTION OR VERDICT BY THEN, WE WILL LET YOU GO GET A BITE TO EAT.

THE COURT: ALL RIGHT. WE WILL BE IN RECESS.

MR. SWERLING: JUDGE, COULD YOU -- BEFORE WE GO OFF -- I'M JUST CONCERNED ABOUT THIS ISSUE, IS THERE SOME WAY YOU CAN FASHION -- MAYBE WE CAN FASHION SOMETHING THAT SAYS THAT THAT CONSPIRACY NECESSARILY INVOLVES PROOF BEYOND A REASONABLE DOUBT THAT TWO OR MORE PEOPLE CONSPIRED TO COMMIT AN UNLAWFUL ACT. IF THEY DON'T FIND THAT TWO OR MORE PEOPLE CONSPIRED TO COMMIT AN UNLAWFUL ACT, THEN THE ANSWER TO THAT QUESTION IS --

MR. LAWSON: YOUR HONOR, I THINK IN THIS CASE, WE NEED -- THIS JURY IS CONFUSED IN THAT THE INDICTMENT HAS ONLY ALLEGED TWO CO-CONSPIRATORS. AND I THINK THEY NEED -- THAT NEEDS TO BE POINTED OUT TO THEM. THAT IN THIS CASE IN COUNTS ONE AND TWO, THE GOVERNMENT HAS ONLY ALLEGED --

THE COURT: I THINK THAT IS IN THE CHARGE I HAVE GIVEN THEM.

MR. LAWSON: BUT, I THINK THEIR QUESTION INDICATES THAT THEY DON'T UNDERSTAND THAT.

MR. SWERLING: I THINK THAT'S WHY I SUGGESTED JUST REREADING THE CHARGE NOW THAT YOU HAVE EXPLAINED IT, I THINK WE MAY HAVE CAUSED SOME PROBLEMS.

THE COURT: PAGE 14 OF THE CHARGE, I SAID FOUR ELEMENTS ARE AS FOLLOWS: FIRST, THAT TWO DEFENDANTS ENTERED INTO AN UNLAWFUL AGREEMENT ENTERED IN THE INDICTMENT THE TWO -- SAY TWO OR MORE OR SEVERAL PEOPLE, I SAID THE TWO DEFENDANTS.

MR. SWERLING: THAT'S WHY I THOUGHT THE CHARGE WAS

ADEQUATE.

THE COURT: THAT'S WHAT I JUST GAVE THEM AGAIN WHEN THEY CAME OUT JUST NOW.

MR. MOORE: YOU ATTEMPTED TO ANSWER THEIR QUESTION, YOUR HONOR. AND I WOULD FIRST POINT OUT THAT NEITHER DEFENDANT OBJECTED TO THIS CHARGE AT THE TIME OF IT GIVEN, YOU GAVE THEM AN ANSWER TO THEIR QUESTION, THEY SEEM TO TAKE THAT AS THE ANSWER. THE FOREPERSON IS A PARA LEGAL. I AM SURE THAT IF THEY HAVE ANOTHER QUESTION, THEY WILL SUBMIT IT TO US.

THE COURT: WELL, YOU KNOW, I RAISED THIS ISSUE BEFORE THE CASE WENT TO THE JURY, WHEN WE TALKED ABOUT THAT PAGE 32, YOU KNOW, ON GUILT OR INNOCENCE OF EACH DEFENDANT ON EACH COUNT TO BE JUDGED SEPARATELY. SO IT IS NOT SOMETHING THAT WE DIDN'T THINK ABOUT. I TRIED TO STRUCTURE IT WHERE THAT QUESTION WOULD HAVE BEEN ANSWERED ALREADY. BUT APPARENTLY WE DIDN'T,

MR. SWERLING: I DON'T HAVE ANY PROBLEM WITH THE CHARGE. YOU KNOW, THERE'S NO REASON FOR ME TO OBJECT TO YOUR HONOR CHARGING THE JURY. THERE'S ONLY TWO PEOPLE IN THE CONSPIRACY, THAT'S TO MY BENEFIT. I'M NOT GOING TO GO OBJECT TO THAT. BUT, I DO HAVE A PROBLEM WITH WHAT -- THE WAY THE JURY'S QUESTION WAS FRAMED, OTHER THAN RECHARGING THEM TRYING TO EXPLAIN IT.

BECAUSE NOW I DON'T KNOW THAT THEY UNDERSTAND WHY THEY CAN'T FIND HIM GUILTY.

THE COURT: WELL, YOUR OBJECTION IS NOTED. BUT I THINK I HAVE ADEQUATELY ANSWERED THEIR QUESTION, EXPLAINED THE ANSWER THAT I GAVE TO THEM. SO WE WILL STAND ON THAT. AND WE WILL BE IN RECESS UNTIL FURTHER NOTICE.

THE MARSHAL: ALL RISE.

THE COURT: THE QUESTION READS AS FOLLOWS: WE WOULD LIKE TO VIEW THE VIDEOTAPE OF THE MEETING AT THE REST STOP BETWEEN MR. DON PRINCE AND UNDERCOVER SLED AGENT. WE WOULD ALSO LIKE TO HEAR THE AUDIO TAPE OF THE CONVERSATION BETWEEN MR. BILL PRINCE AND MR. SCOTT SHERPINSKAS.

NOW, THERE WAS A VIDEOTAPE AND AN AUDIO TAPE AT THE REST STOP MEETING. THEY ONLY ASKED FOR THE VIDEOTAPE.

MS. WILSON: THAT'S FINE, WE CAN DISTRIBUTE --

THE COURT: THE VIDEO HAD AUDIO TO IT, BUT IT WAS NOT AS AUDIO AS THE OTHER TAPE; RIGHT?

MS. WILSON: I THINK THAT'S DEBATEABLE. WHEN WE PLAYED THE VIDEOTAPE, YOU COULD PLAY THE AUDIO, WE PLAY IT AS WE PLAYED IT DURING THE TRIAL WITH THE HEADPHONES.

THE COURT: READY TO GO ON THAT? CAN YOU --

MS. WILSON: I BELIEVE THE VIDEOTAPE WENT BACK WITH THEM. IF THEY CAN GET IT OUT --

THE COURT: WE NEED THE GET THE TRANSCRIPTS ALSO.

MR. MOORE: WE ARE PLAYING THE VIDEOTAPE FIRST, WE WILL PUT THE VIDEOTAPE TRANSCRIPTS OUT FIRST.

THE COURT: I THINK I GIVE ANOTHER BRIEF CAUTIONARY

Supreme Court, U.S.
FILED
DEC 18 1999
CLERK

No. 99-863

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

DON PRINCE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PRO SE SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Additional Questions Presented

1. In a prosecution for conspiracy in violation of 18 U.S.C. § 1958 (a), where only two co-conspirators were indicted but the government's evidence revealed an unindicted co-conspirator, did the trial court commit reversible error as to petitioner by instructing that if the jury found one of the indicted co-conspirators guilty it also must find the other guilty?

2. By instructing the jury that if it found guilty one of the two indicted co-conspirators, it also must find guilty the second conspirator, did the trial court violate petitioner's rights to due process and jury trial?

Pro Se Supplement to Petition for Certiorari

On November 18, 1999 Mr. Jack Swerling, the attorney who represented petitioner, Don Prince, in the courts below, filed a petition for certiorari on petitioner's behalf. This petition was placed on the court's docket on Nov. 22, 1999. Because petitioner is incarcerated in Butner, North Carolina and his counsel is in Columbia, South Carolina, it has been difficult for them to communicate. Therefore petitioner, who was uncertain whether a petition would be filed and had obtained an extension of time until December 15, 1999 to file a pro se petition for certiorari, is filing this supplement to the filed petition and incorporates and adapts the provisions of that petition.

Opinion Below

The unpublished opinion of the Court of Appeals for the Fourth Circuit and the opinion of the United States District Court for the District of South Carolina are in the Appendix to the previously filed petition.

Jurisdiction

Jurisdiction is conferred by 28 U.S.C. § 1254 (1). The decision of the Fourth Circuit took effect on August 17, 1999.

Constitutional and Statutory Provisions

U.S. Constitution, Amendment V provides in relevant part: "No person shall be ... deprived of life, liberty, or property, without due process of law".

U.S. Constitution, Amendment VI provides in relevant part. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...

Statement of the Case

The proceedings below and facts of the case have been stated in the petition for certiorari heretofore filed in the case, which contains a statement of the case that is incorporated herein by reference in this supplement. However, in order to provide a more complete understanding of the two questions presented in this supplement to the petition it is important to call to the Court's attention certain additional facts.

Additional Facts

In light of some of the evidence that had been received at trial and which indicated that George Young was an unindicted coconspirator with the two defendants, the trial judge raised with the parties an issue concerning the jury instructions that should be given:

> THE COURT: The second question regarding the conspiracy counts, the indictment only alleges two conspirators. And so I have the standard conspiracy charge, tells the jury that the government must prove that two or more people formed a conspiracy, and that defendants, at some time, joined the conspiracy, et cetera, et cetera.
>
> But I think here, I just need to say the government must prove that the two defendants formed a conspiracy. There's no allegation that anyone else was a member of the conspiracy; am I correct?
>
> MR. MOORE: Beg one moment, your honor
>
> (PAUSE IN PROCEEDINGS)
>
> MR. MOORE: "Your honor, Ms. Wilson tells me the tapes refer to having someone else going to check on Peachy and check on Peachy's stuff, see if Peachy was, in fact, dead.
>
> I think"--
>
> THE COURT: What about--what is the law on government undercover agents? They cannot be conspirators?
>
> MR. MOORE: They cannot be, so Mr.--just all those are out, they can't be conspiracies.
>
> MR. MOORE: Young was not a government agent at the time he participated in these acts. I guess you could argue if you believe his testimony in full, you could believe that he was not really a co-conspirator, because he was scamming. The jury could probable conclude, however, that he was a co-conspirator, and that he was telling the truth.

As you know, your honor, the jury is free to believe , all or part of a witness' testimony. And they could believe that he really did commit these acts, but he really did intend to help these guys commit the murder At some point may have changed his intention.

I think, your honor, you should tell the jury that the government has to prove that two or more persons, not just the defendants, but two or more persons combined to commit or conspired.

THE COURT: That's the way it reads in what you have been given. Let me give that some more thought. We'll take that up later.

MR. SWERLING: Judge, I point out that the indictment is unique in this case It does not even allege, as others and most indictments do, it's only two of them alleged.

THE COURT: I noticed that; you are right. Trial Transcript Excerpts, July 13, 1996 at 35-36. **see Appendix D.**

Later in the trial the jury instructions were discussed further as they pertained to finding only one of the defendants guilty of conspiracy. The court remarked: "I never had a conspiracy before that was closed in", but one of the attorneys, Ms. Wilson, pointed out, "I know that all the time juries come back with inconsistent verdicts. And this could be one of those situations." Ms. Wilson also asserted: "Well, I think they have a right to have an inconsistent verdict, if they want to." Trial Transcript Excerpts, July 15, 1996 at 143. **see Appendix E.**

After the jury began to deliberate, the same issue was raised by this question from the jury: "In relation to counts one and two regarding the alleged conspiracy, can we render a guilty verdict for one defendant and/or a not guilty verdict for the other defendant." Trial Transcript Excerpts, July 15, 1996 at 213. Subsequently, when the jury presented its note, the court's confusion continued:

THE COURT: It is a matter we discussed earlier. I think the answer to that question is no. Right? I just think that you can't conspire with yourself...Well, I just don't think a jury should be instructed it is appropriate to bring back an inconsistent verdict. Id. **see Appendix F**

THE COURT: Well, should I go further and say that is says a person

cannot conspire with themselves? It takes two or more people to form a conspiracy. In this case the two members of the conspiracy are two defendants, and those two alone. I mean, should I explain the answer, in other words?" Id. At 214. **see Appendix F-2**

There ensued extensive discussion between the court and counsel, after which the court gave a negative answer to the jury's question even though the defense counsel made clear that he was dissatisfied with this instruction. No reference was made in the jury instruction either to the jury's power to render an inconsistent verdict or to the possibility that George Young might be an unindicted co-conspirator with whom Bill Prince but not petitioner Don Prince had conspired.

Reasons for Granting the Writ

I. THE TRIAL COURT'S INSTRUCTIONS MISLED THE JURY WITH RESPECT TO THE ALTERNATIVES LOGICALLY AVAILABLE TO IT.

The indictment charged only two persons, Don and Bill Prince with conspiracy and did not leave open the possibility that there might be an unindicted co-conspirator. Without seeking to amend the indictment, the government offered evidence of an unindicted co-conspirator, George Young. Then, in the instructions to the jury, the trial court failed to inform the jury how to dispose of an alternative that had become reasonably available to it under the evidence - i.e., to find that one, but not both, of the two indicted co-conspirators had conspired with the unindicted co-conspirator. In connection with this alternative, the jury should have been advised that if it concluded that a conspiracy had existed but only one of the two defendants had been a party to this conspiracy, then the other defendant could not have been convicted of that conspiracy.

In this connection, it deserves emphasis that "a conspiracy conviction does not depend for its validity on the identification of co-conspirators. Rather it is sufficient that the evidence

'supports the proposition that such a co-conspirator did exist and that the defendant did conspire with him.'" U.S. v. Winn, 958 F.2d 145, 156-157 (5th Cir. 1991) (citing Rogers v. U.S., 340 U.S. 367, 375, 71 S.Ct. 438, 95 L.Ed. 344 (1951)). "Normally, a criminal defendant can be convicted of conspiring with anyone. The defendant's co-conspirator does not have to be named in the indictment." U.S. v. Lopez, 6 F.3d 1281, 1288 (7th Cir. 1993) (emphasis added).

Petitioner's case is strikingly similar to the Lopez case, where the indictment named only two defendants in a drug conspiracy; however, the trial evidence revealed an additional co-conspirator. One of the defendants named in the indictment was acquitted of the conspiracy count. Id. at 1284. On appeal, Chaidez, the convicted defendant, complained "that the district court effectively amended the indictment when it instructed the jury that Chaidez could be guilty of criminal conspiracy if the jury found that he conspired with a co-conspirator who was not named in the indictment." Id. at 1287. In other words, Chaidez "claim[ed] that the admission of the testimony about Rodriguez [an unmentioned and unindicted co-conspirator], coupled with the jury instructions, told the jury that he could be guilty for conspiring with Rodriguez even though the conspiracy count of the indictment charged that the named co-conspirators conspired only 'with each other'". Id.

The Lopez Court of Appeals concluded that the trial court had not committed plain error on the theory that the court's jury instructions expanded the scope of the conspiracy charged in the indictment. Id., 6 F.3d at 1288. Thus, the appeals panel upheld Chaidez's conspiracy conviction although the only named co-conspirator was acquitted. The court did so because the evidence revealed another unnamed and unindicted co-conspirator.

Likewise, in the case at bar, the indictment named only two defendants and did not mention

any known, unknown or unindicted co-conspirators. Nevertheless, the government's evidence exposed an additional co-conspirator--Young--and the government admitted that the jury could consider Young as a co-conspirator since he was not a government agent. *See* Appendix at D-2. The government also advised the court that "juries come back with inconsistent verdicts. And this could be one of those situations." *See* Appendix at E-1 and E-2.

While it is true that an individual cannot be convicted for conspiring with himself; where evidence clearly demonstrates that another unindicted co-conspirator, known or unknown to the grand jury, was involved in the conspiracy, a conspirator's conviction will not be reversed based upon the reversal of a co-conspirator's conviction. *See* U.S. v. Bell, 651 F.2d 1255, 1258 (8th Cir. 1981). *See also* U.S. v. Sparrow, 470 F.2d 885, 888 (10th Cir. 1972) (defendant's conviction for conspiracy must be affirmed in view of the additional untried co-conspirator named in the indictment, notwithstanding acquittal of the only named codefendant).

In short, where two defendants were charged with conspiracy with others, unknown to the grand jury, to commit an offense, and the evidence sustained the allegation that others were engaged in the conspiracy, the acquittal of one defendant charged is not inconsistent with conviction of the other. Donegan v. U.S., 287 F. 641 (2nd Cir. 1922).

Indeed, the Court of Appeals below has concluded that finding a co-conspirator not guilty did not require defendant's acquittal of conspiracy, even though verdicts would be inconsistent. *See* U.S. v. Thomas, 900 F.2d 37, 40 (4th Cir. 1990) (and cases cited therein); *see also* U.S. v. Mitchell, 146 F.3d 1338, 1344 (11th Cir. 1998); U.S. v. Branch, 91 F.3d 699, 720-722 (5th Cir. 1996); Mapes v. Coyle, 171 F.3d 408, 419-420 (6th Cir. 1999).

In this case, the government presented evidence that Young was not a government agent

and, therefore, the jury could conclude that he was a co-conspirator, although he was not mentioned in the indictment. Indeed, the government admitted that Young could be considered a co-conspirator. Thus, the government caused a constructive amendment of the indictment. *See* U.S. v. Floresca, 38 F.3d 706, 710-712 (4th Cir. 1994) (constructive amendment to indictment occurs when either government, court, or both broadens the possible bases for conviction beyond those presented by the grand jury); *See also* U.S. v. Castro, 89 F.3d 1443, 1452-1453 (11th Cir. 1996). Thus, it is clear that the jury might properly have acquitted petitioner Don Prince but yet convicted Bill Prince on the theory that Bill conspired with Young. However, the jury instructions precluded the jury from choosing that alternative.

"The burden of the exercise of lenity falls only on the Government, and it has been suggested that such an alternative should be available for the difficult cases where the jury wishes to avoid an all-or-nothing verdict. Such an act is, as the *Dunn* Court recognized, an 'assumption of a power which [the jury has] no right to exercise.' But the illegality alone does not mean that such a collective judgment should be subject to review. The fact that the inconsistency may be the result of lenity, coupled with the Government's inability to invoke review, suggests that inconsistent verdicts should not be reviewable." U.S. v. Powell, 469 U.S. at 66.

Petitioner would also direct this Court's attention to the opinion in U.S. v Suppenbach, 1 F.3d 679 (8th Cir. 1993). There, the defendant raised a claim that the trial court's supplemental jury instructions on a conspiracy count was error. Just as with the jury in the case at bar, the jury in Suppenbach, was left confused as to the conspiracy and possible co-conspirators. The jury sent a note to the court which read as follows:

"Is Count 1 the conspiracy between John Webber and Bob Suppenbach only or is

Syntech involved also on Count 1 ?"

"The court answered that '[t]he conspiracy charge does not name co-conspirators and the instructions do not confine jury consideration to particular companies or individuals. It will be the jury's responsibility to determine from the evidence if there was a conspiracy and, if so, what companies or individuals were involved." Id. 1 F.3d at 683 (emphasis added).

The court concluded that the trial "court properly instructed the jury that it would have to be guided by the evidence, instructions, and arguments in determining whether Centek was involved in Count 1. The court appropriately refused to tell the jury that Centek was not involved in the conspiracy....Although the indictment and the instructions required the jury to find that Suppenbach and Weber had conspired, they did not foreclose a finding that Kueser and Centek were also involved in the conspiracy." Suppenbach, 1 F.3d at 683.

Thus, while the court's supplemental jury instruction in Suppenbach was proper, in the case at bar, the court's supplemental jury instruction precluded the jury from acquitting petitioner Don Prince and convicting only Bill Prince of conspiring with Young. Indeed, in light of the circumstantial evidence against petitioner, it is more than probable that the jury entertained thoughts of acquitting petitioner; but that possibility vanished when the court instructed the jury that, if it should convict either of the defendants, it must convict the other on the conspiracy counts.

In a similar case, U.S. v. Glickman, 604 F.2d 625 (9th Cir. 1979), a case involving supplemental jury instructions on the conspiracy counts, the jury note read:

> "Judge Murray----Is the conspiracy charge against either defendant mean that the conspiracy has to be between Glickman and Rowe only?" Id. at 631.

After discussing the note with both parties, the court replied to the jury by a note which read: "No. There can be no conviction of one defendant without conviction of the other defendant in the case." Id. (There was disagreement as to the court's reply).

The appellants pointed out that the indictment also charged "others both known and unknown to the grand jury" and that the "jury might have found that conspiracy existed between only one of the appellants and one or more of the unnamed members of the conspiracy, but, on the basis of the supplementary instruction, erroneously concluded that the other appellant must also be convicted of the conspiracy charge. Glickman, 604 F.2d at 631.

After conducting a "plain error" review because the appellants had failed to challenge the supplemental jury instruction at trial, the court concluded that the error did not constitute plain error because the "evidence adduced at trial showed that only Glickman and Rowe were members of the conspiracy." *Id.* at 632.

Thus, the facts of Glickman are similar to case at bar with the exception that petitioner's indictment did not mention any other defendants. However, the government's evidence established that Young was a co-conspirator and the government admitted that the jury could properly find that Young was a co-conspirator. In Glickman, there was no evidence of other conspirators other than the two named in the indictment. Nevertheless, both courts gave supplemental jury instructions on the same question from the jury.

In short, the supplemental jury instruction in Glickman was considered not error since there was no evidence of any conspirators except the two named in the indictment. On the other hand, in the case at bar, the government produced evidence of another co-conspirator, George Young. Thus, here the court's supplemental jury instruction was error.

"A trial judge must be painstakingly impartial any time he communicates with the jury during deliberations. He must insure that any supplemental instructions are accurate, clear, neutral, and non-prejudicial." Suppenbach, 1 F.3d at 683.

In this case, the trial court's supplemental jury instructions were wrong in light of the government's evidence and admission that Young had conspired with someone. Thus, the jury should have been advised in the same manner as the jury in Suppenbach, that is, the jury should have been instructed that "the instructions do not confine jury consideration to particular.....individuals" and that is was "the jury's responsibility to determine from the evidence if there was a conspiracy and, if so, what.....individuals were involved." Id. (emphasis added). Instead, the court instructed the jury in a manner identical to the court in Glickman, that is, the court instructed the jury that, should it find one of the defendants guilty, it must convict the other defendant. Glickman, 604 F.2d at 631. Unlike the appellant in Glickman, petitioner objected at trial and the court noted the objection. *See* Appendix at F-9.

The influence of the trial judge on the jury is necessarily and properly of great weight and his lightest word or intimation is received with deference, and may prove controlling. Because of this influence, some errors in jury instructions — those "likely to remain firmly lodged in the memory of the jury and to excite prejudice" — simply cannot be cured by a statement that the court's opinions are not binding on the jury. Quercia v. U.S., 289 U.S. 466, 472, 53 S.Ct. 698 (1933).

Finally, petitioner would direct this Court's attention to the opinion in U.S. v. Hopkinson, 631 F.2d 665 (10th Cir. 1980). Hopkinson was indicted jointly with Michael Hickey for various offenses relating to an explosive bomb. The charges included, *inter alia*, conspiracy in violation of

18 U.S. C. § 371. Hopkinson was convicted, and Hickey acquitted, on all counts. An unindicted conspirator and government witness, Jeff Greene, was arrested and subsequently testified against Hopkinson at trial. Id at 666-67. Hopkinson appealed claiming that his convictions on all counts should be reversed because of the inconsistent verdicts since Hickey was acquitted on all counts. *Id.* at 668.

The court concluded that the "character and quality of the defenses of Hopkinson and Hickey were so different that the jury had a reasonable basis for return of different verdicts. Hopkinson had a motive"... and "[n]o motivation is shown for Hickey...." Id. The court went on to state:

> "The argument that the acquittal of co-conspirator Hickey on the conspiracy count precludes conviction of Hopkinson on that count is of no avail. The principle that one may not conspire with himself is of no materiality. Green was named as an unindicted co-conspirator. Green testified that he and Hopkinson acted in concert to make and transport the bomb. Accordingly, the acquittal of Hickey is immaterial." Hopkinson, 631 F.2d at 668.

Likewise, in this case, Young was an unindicted co-conspirator who testified that he had acted in concert with Bill Prince as well as petitioner. Moreover, the "character and quality of the defenses" of petitioner and Bill Prince "were so different that the jury had a reasonable basis for return of different verdicts." Bill Prince "had a motive" for the attempted murders. However, "no motivation is shown for" petitioner.

In sum, the opinions in Powell, Hopkinson, Glickman and Suppenbach, *supra*, establish that the jury in this case had reasonable justification, as well as a legal right, to return an inconsistent verdict. Thus petitioner contends that the trial court violated his due process rights by misinstructing the jury that, should the jury convict one defendant, the jury should also convict the

other defendant.

II. THE TRIAL COURT'S INSTRUCTION IMPROPERLY INFRINGED ON PETITIONER'S RIGHT TO A JURY TRIAL.

A jury may render an inconsistent verdict. See, eg., Dunn v. U.S., 284 U.S. 390 (1932); United States v. Dotterwich, 320 U.S. 277 (1963) (inconsistency in a verdict is not sufficient reason for setting it aside); Harris v. Rivera, 454 U.S. 339 (1981); United Sates v. Powell, 469 U.S. 57 (1984). Admittedly these cases arise in the context of appealing from a conviction on the grounds that it was inconsistent with an acquittal as to another charge. However, as Powell makes clear a jury may exercise leniency as to a particular charge and in so doing is performing its "historic function, in criminal trials, as a check against arbitrary or oppressive exercises of power by the Executive Branch." Powell, 469 U.S. at 65.

The issue then becomes whether a trial court may properly preclude the jury from exercising its historic function by instructing that if it finds a defendant - or here a co-defendant - guilty of a charge, it must then find the defendant guilty of an additional charge. Petitioner submits that to authorize the peremptory instructions given in this case would impermissibly limit his right to jury trial.

The failure of the court properly to instruct the jury about this alternative that was raised by the evidence deprived petitioner of his due process right to be tried by a jury which was properly instructed about how to apply the law to the evidence. The circumstance that the jury asked specifically what to do if the evidence proved that only one of the two defendants had participated makes it clear that the error was not harmless. Indeed, under the circumstances of this case to

require the jury to convict petitioner of conspiracy if it found his co-defendant Will Prince to be guilty deprived him of the presumption of innocence and the due process right to have his guilt proved beyond reasonable doubt. Moreover, the impact of this error undercuts the conclusion of the Court of Appeals that petitioner was not harmed by the trial court's error in admitting evidence that petitioner had aided a fugitive.

III. BECAUSE OF THE CONFLICT AND CONFUSION EXPRESSED BY LOWER COURTS WHEN INSTRUCTING A JURY ON "CLOSED-IN" CONSPIRACY CHARGES, THIS HONORABLE COURT SHOULD EXERCISE ITS POWER OF SUPERVISION TO PROVIDE THOSE COURTS WITH GUIDANCE.

In the case at bar, the trial court expressed a concern that the jury might return an inconsistent verdict on the conspiracy counts. On two different occasions, the court discussed the matter with the parties. The first time the court raised the issue, no decision was made as to what instruction to give the jury. *See* Appendix D-1 and D-2. The second time the matter was discussed, the trial court expressed its confusion:

> "THE COURT: I would stop if I had seen her. Let me just raise one question on the jury instructions, A boiler-plate page that says you got to consider each count on each defendant individually. And there's a sentence says the fact you may find one or more of the defendants guilty or not guilty of any offenses should not affect your verdict on any other offense.
> Well, technically, if they find guilt on count one or two [conspiracy counts], it's got to be against both defendants; right?
>
> THE COURT: The conspiracy counts couldn't find one guilty, the other not guilty on conspiracy." *See* Appendix E-1 (emphasis added).

The trial court continued to express its confusion:

> THE COURT: I never had a conspiracy before that was closed in.
>
> THE COURT: That's the problem, conspiracy other alleged members it would be

possible to find just one of the two defendants guilty. But, Ms. Wilson, Mr. Josey, Don't you agree that is is up or down all or nothing on counts one and two?

MS. WILSON: Your Honor, I understand what you're saying. But I know that all the time juries come back with inconsistent verdicts. And this could be one of those situations. But I understand.

THE COURT: I know. I'm trying to make in advance prevent that from happening, if I can.

MS. WILSON: Well, I think they have a right to have an inconsistent verdict, if they want to.

THE COURT: What do we do— hypothetically, if they convict one defendant, not the other on count one.

MS. WILSON: Nothing.

MR. SWERLING: Rule' 29.

MR. MOORE: Then we argue about whether it is inconsistent verdict, at that point. I hesitate to put the cart before the horse.

THE COURT: That's getting too far ahead. What do I need to say in the charge? *See* Appendix E-2 and E-3 (emphasis added).

Thus, it is clear that the trial court below was confused as to the proper response to the jury's question.

Similarly, in U.S. v. Glickman, 604 F.2d 625 (9th Cir. 1979), the court was faced with the same problem. After the jury began deliberations, it sent a note to the trial judge requesting additional guidance regarding the law of conspiracy. Subsequently, the court replied: "No. There can be no conviction of one defendant without conviction of the other defendant in the case." Id. at 631. Thus, the court provided supplemental instructions that were improper, in part, because the evidence revealed that other unindicted people participated in the offense — just as George Young in this case was an unnamed,

unindicted co-conspirator, unknown to the Grand Jury.

On the other hand, in U.S. v. Suppenbach, 1 F.3d 679 (8th Cir. 1993), faced with the same problem as the court below and the court in Glickman, the court provided completely different supplemental jury instructions. When the Suppenbach jury questioned the court concerning the conspiracy charge jury instruction, the court answered: "The conspiracy charge does not name co-conspirators and the instructions do not confine jury consideration to particular companies or individuals. It will be the jury's responsibility to determine from the evidence if there was a conspiracy and, if so, what companies or individuals were involved." Id, 1 F.3d at 683.

The supplemental jury instructions in this case and those in Glickman are a complete odds with this Court's decision in Powell, i.e., that inconsistent verdicts are permissible. As a result of the conflict and confusion of these lower courts, petitioner contends that the United States Supreme Court's guidance is necessary as to four basic questions.

First where an indictment names only two defendants in a criminal conspiracy charge, what is the proper jury instruction with which to permit inconsistent verdicts? Second, where an indictment names only two defendants in a criminal conspiracy charge but the prosecution's evidence established another conspirator who was unnamed and unknown to the Grand Jury and also unindicted, what is the proper instruction to the jury when the jury expresses a desire to acquit one of the defendants? Third, where an indictment names two defendants and others known and/or unknown to the Grand Jury, what is the proper instruction for the jury when it expresses a desire to acquit one of the

defendants? Finally, is it proper for a trial court to tailor jury instructions in a manner as to attempt to prevent an inconsistent verdict as the court did in the case at bar?

Petitioner submits that these are pressing questions that should be addressed and that this Court should provide guidance to the lower courts in order to maintain integrity in the judicial system. Federal prosecutions for conspiracy are myriad; and this case presents issues which could recur frequently in such prosecutions. The effect of failing to indict or even to mention in the conspiracy indictment a person whom the evidence proves to be a co-conspirator is unclear. The answers to these issues will clarify an area that today is uncertain and also will protect petitioner's rights to due process and jury trial.

Conclusion

For the above stated reasons as well as for those stated in the previously filed petition for certiorari, the petition for certiorari should be granted.

Respectfully submitted,

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